Supreme Court, U.S.
FILED
FEB 4 1993
OFFICE OF THE CLERK

92-1388

No. _____

In the
Supreme Court of the United States
October Term, 1992

LARRY J. HALL, d/b/a
721 ASSOCIATES and d/b/a
ASSOCIATED MARKETING,

Petitioner,

v.

STATE OF MINNESOTA, by its
Attorney General, HUBERT H. HUMPHREY, III,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

PETITION FOR WRIT OF CERTIORARI

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1992 — Bachman Legal Printing, 835 Second Ave. So., Mpls., MN 55402 — (612) 339-9518
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178 pp

QUESTIONS PRESENTED

I. Where automatic dialing-announcing devices (ADADs) are an integral component of small business advertising, and where Minnesota and more than 40 other state legislatures, as well as the United States Congress, have enacted laws severely restricting or banning outright the use of ADADs for commercial solicitation, should the Court grant certiorari for the purpose of reviewing challenges to the Minnesota statute on the grounds that it infringes upon the freedom accorded commercial speech under the First and Fourteenth Amendments to the United States Constitution?

II. Does Minn. Stat. § 325E.27, prohibiting the use of an ADAD for commercial solicitation without the use of a live operator or the prior consent of the called party, violate the petitioner's right to freedom of speech under the First and Fourteenth Amendments under the test set forth in *Central Hudson Gas & Elec. Corp. v. Public Service Com'n*, 447 U.S. 557 (1980)?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992
No. _____

LARRY J. HALL, d/b/a 721 ASSOCIATES and d/b/a ASSOCIATED MARKETING, Petitioner,

v.

STATE OF MINNESOTA, by its Attorney General, HUBERT H. HUMPHREY, III, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

Larry J. Hall respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Minnesota.

OPINIONS BELOW

The decision of the Supreme Court of Minnesota which gives rise to this petition is reported at 491 N.W.2d 882 and is located *infra* at App. A1-A25. That opinion upheld the decision of the Minnesota Court of Appeals, which is reported at 475 N.W.2d 505 and located *infra* at App. A26-A33. The Court of Appeals ruling in turn upheld an order of the Ramsey County District Court, whose Findings of Fact, Conclusions of Law, Order, and Memorandum are unreported but may be found *infra* at App. A34-A44.

JURISDICTION

On November 6, 1992, the Supreme Court of Minnesota upheld a temporary injunction issued against petitioner Hall pursuant to Minn. Stat. §§ 325E.26 *et seq.*, which prohibits use of automatic dialing-announcing devices (ADADs) for telephone solicitation without a live operator or prior consent of the called party. In so ruling, the Minnesota Supreme Court rejected petitioner's objections that the statute, and therefore the injunction, were invalid under the First and Fourteenth Amendments of the United States Constitution. For purposes of jurisdiction, the Minnesota Supreme Court decision is equivalent to a final judgment and is therefore reviewable on a Writ of Certiorari pursuant to 28 U.S.C. § 1257(a) (1988). *See National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977)*; *Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 476-87 (1975).*

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. I, in relevant part provides:

> Congress shall make no law . . . abridging the freedom of speech . . .

U.S. Const. amend. XIV in relevant part provides:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Minn. Stat. §§ 325E.26-.31 (1990) provide:

AUTOMATIC DIALING-ANNOUNCING DEVICES

325E.26. Definitions

Subdivision 1. Scope. The terms used in sections 325E.26 to 325E.30 have the meanings given them in this section.

Subd. 2. Automatic dialing-announcing device. "Automatic dialing-announcing device" means a device that selects and dials telephone numbers and that, working alone or in conjunction with other equipment, disseminates a prerecorded or synthesized voice message to the telephone number called.

Subd. 3. Caller. "Caller" means a person, corporation, firm, partnership, association, or legal or commercial entity who attempts to contact, or who contacts, a subscriber in this state by using a telephone or telephone line.

Subd. 4. Commercial telephone solicitation. "Commercial telephone solicitation" means any unsolicited call to a residential subscriber when the person initiating the call has not had a prior business or personal relationship with the subscriber, and when the purpose of the call is to solicit the purchase or the consideration of purchase of goods or services by the subscriber. Commercial telephone solicitation does not include calls initiated by organizations listed in section 290.21, subdivision 3, clauses (a) to (e).

Subd. 5. Subscriber. "Subscriber" means a person who has subscribed to telephone service from a telephone company or the other persons living or residing with the subscribing person.

325E.27. Use of prerecorded or synthesized voice messages

A caller may not use or connect to a telephone line an automatic dialing-announcing device unless: (1) the subscriber has knowingly or voluntarily requested, consented to, permitted, or authorized receipt of the message; or (2) the message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered. This section and section 325E.30 do not apply to (1) messages from school districts to students, parents, or employees, (2) messages to subscribers with whom the caller has a current business or personal relationship, or (3) messages advising employees of work schedules.

325E.28. Requirements on automatic-dialing announcing devices

A caller shall not use an automatic dialing-announcing device unless the device is designed and operated so as to disconnect within ten seconds after termination of the telephone call by the subscriber.

325E.29. Message requirements

Where the message is immediately preceded by a live operator, the operator must, at the outset of the message, disclose:

(1) the name of the business, firm, organization, association, partnership, or entity for which the message is being made;

(2) the purpose of the message;

(3) the identity of kinds of goods or services the message is promoting; and

(4) if applicable, the fact that the message intends to solicit payment or commitment of funds.

325E.30. Time of day limit

A caller shall not use an automatic dialing-announcing device nor make any commercial telephone solicitation before 9:00 a.m. or after 9:00 p.m.

325E.31. Remedies

A person who is found to have violated sections 325E.27 to 325E.30 is subject to the penalties and remedies, including a private right of action to recover damages, as provided in section 8.31.

STATEMENT OF THE CASE

Respondent State of Minnesota commenced two separate actions against petitioner Larry J. Hall and companies on whose behalf he performed telemarketing services,[1] seeking to enjoin them from using automatic

[1] The other defendants in those actions, Universal American Credit Card, Inc., and Casino Marketing Group, Inc., are not parties to this petition.

dialing-announcing devices ("ADADs") in violation of Minn. Stat. §§ 325E.26 *et seq.* (1990). In particular, the state sought to enjoin the defendants' use of ADADs without a live operator or the prior consent of the called party, as required by section 325E.27.[2] The first lawsuit was entitled *State of Minnesota by Humphrey v. Casino Marketing Group, Inc.*, (App., A45-A53), and the second was captioned *State by Humphrey v. Universal American Credit Card, Inc.* (App., A54-A67). Along with the summons and complaint in each case, the state filed a motion for a temporary injunction against the defendants' use of ADADs in violation of the statute. (App., A68-A73)

Hall answered and counterclaimed in both actions, requesting that the district court deny injunctive relief to the state and that it instead enjoin enforcement of the ADAD statute on the grounds that it abridged his right to free speech guaranteed by the First and Fourteenth Amendments of the United States Constitution. Hall also moved for temporary injunctive relief.

Judge George Peterson of the Ramsey County District Court consolidated the motions and cross-motions for a temporary injunction for hearing. The court issued its Findings of Fact, Conclusions of Law, Order, and Memorandum covering both cases on April 4, 1991, granting the state's motions and denying Hall's cross-motions. (App., A34-A44)

[2] The suits also alleged that the messages were fraudulent and deceptive. The lower court held, and the Minnesota appellate courts agreed, that the record in connection with the motions for temporary injunction did not contain sufficient evidence to support a finding that the messages were either fraudulent or deceptive. (App. A37, 475 N.W.2d at 507, 491 N.W.2d at 887)

On Hall's interlocutory appeal, the Minnesota Court of Appeals affirmed the district court's order and rejected Hall's arguments that Minn. Stat. §§ 325E.26 *et seq.* violated his free speech rights guaranteed by the Constitution of the United States. 475 N.W.2d at 508. Hall then appealed to the Supreme Court of Minnesota and again raised the constitutional challenges to the statute. The supreme court affirmed the court of appeals decision on November 6, 1992. 491 N.W.2d at 892.

STATEMENT OF FACTS

The communication device at the heart of these proceedings, the ADAD, is a computer connected to a telephone line that can automatically dial a pre-programmed list of telephone numbers without the assistance of a live operator, and then play a recorded message when a call is answered.[3] Affidavit of Larry J. Hall (hereafter "Hall Aff.") (App., A74-A76); Mary Lu Carnevale, *Telemarketers Fight Banning of Autodialers*, Wall Street Journal, January 20, 1993, at B1 (App., A115). The most sophisticated machines can transmit messages, ask a series of questions, record the responses, and compute the results. Susan Burnett Luten, Note, *Give Me A Home Where No Salesmen Phone: Telephone Solicitation And The First Amendment*, 7 Hastings Const. L.Q. 129, 129 n.4 (1979). A small business with an

[3] ADADs must be distinguished from instruments commonly known as predictive dialers. Predictive dialers initiate the call from a programmed list of telephone numbers, then transfer the line to a live operator when a person (or an answering machine which the computer thinks is a person) answers the call. The live operator then discusses the product or service with the person called. Predictive dialers are capable of calling about 7,400 numbers every hour. *See generally* Teresa Riordan, *Dread Ringers*, Washington Post Magazine, February 23, 1992, App., A127).

ADAD can dial over 1500 telephones a day without the need for a live operator. Ann Marie Arcadi, Note, *What About the Lucky Leprechaun?: An Argument Against "The Telephone Consumer Protection Act of 1991,"* 1991 Colum. Bus. L. Rev. 417, 417 (1991).

Current technology allows ADAD manufacturers to equip the devices with a number of features which allow the user to minimize problems that might otherwise be associated with the calls. Because the ADAD user pre-programs the telephone numbers into the computer, the user can exclude police stations, hospitals, fire departments, and other emergency response entities.[4] Hall Aff. (App., A76); Affidavit of Carl "Ray" Kolker (hereafter "Kolker Aff.") (App., A110)[5] Moreover, the devices are typically equipped with a mechanism that disconnects the call within one second after the called party hangs up, so the line is tied up only as long as the party called chooses

[4] There was evidence in the proceedings below that Hall's ADADs had in a few instances dialed phones at a local hospital. Hall stated, without contradiction, that those calls had taken place on a day when he was away from the phones, and that when he returned and discovered the problem, he re-programmed the phones to delete the hospital numbers. The problem did not recur. Hall Aff. (App., A76-A77)

[5] Ray Kolker is president of Kolker Systems, one of the few U.S. manufacturers of single-phone-line telecomputers. Kolker Aff. (App., A109). His affidavit was filed in support of Ron and Kathryn Moser's successful motion to temporarily enjoin the enforcement of the Telephone Consumer Protection Act, 27 U.S.C. § 227 (Supp. 1992), discussed *infra* at 10-11, 16 n.10. *See Moser v. FCC*, 61 U.S.L.W. 2387 (D. Or. January 5, 1993). Portions of the transcript of Kathryn Moser's testimony at the hearing on the motion are also attached. *See* Moser Testimony (App., A83-A107). Recognizing that they are not part of the record below, petitioner attaches these materials because they offer additional information about the mechanics and capabilities of ADADs generally and about the effect that restrictions on ADAD use have on those individuals who rely on the machines.

to stay on the line. Hall Aff. (App., A80); Kolker Aff. (App., A109) ADADs can also detect duplicate numbers, preventing an ADAD from dialing the same number twice, or from dialing a number again after receiving an unfavorable response. Hall Aff. (App., A75); Kolker Aff. (App., A111-A112).

ADADs offer a very cost-effective and, for some, the only practical means of advertising. Arcadi, Note, 1991 Colum. Bus. L. Rev. at 417. An ADAD makes six calls in the time it takes a live operator to make one call. Luten, Note, 7 Hastings Const. L.Q. at 130 n.10. Consequently, not only can a business increase the number of calls made, and derivatively the number of sales made, but it also need not pay the salary of the live operator in addition to purchasing or renting the machine. The cost to a business of using a live operator with an ADAD can be up to six times that of using the ADAD alone.[6] *Id.* at 130. The financial burden on a small business precluded from using this fully automated alternative is obvious.

Because of their economy and efficiency, ADADs now form an essential part of small business operations. Not surprisingly, however, the recent growth in ADAD use by small businesses has fanned the flames of the larger controversy surrounding the desirability and legitimacy of telephone solicitations in general. *See generally* Arcadi, Note, 1991 Colum. Bus. L. Rev. 417. As a result, more than 40 states and the United States Congress have enacted

[6] The ADAD is also more cost-effective than solicitation by mail, especially as postal rates increase. *See* Luten, Note, 7 Hastings Const. L.Q. at 130 n.11.

laws which either severely restrict ADAD use or ban their use altogether. *See* section I.(B) *infra*.

Petitioner Hall's own experience bears witness to the critical importance of ADADs as a cost-effective means of disseminating a commercial message, and the financial impact of their prohibition. In the two-year period preceding the state's litigation against Hall, his sole source of income was as an independent contract advertiser using ADADs. Hall Aff. (App., A75) At the time the state brought suit, Hall was using his ADADs on behalf of two different sponsors. One, Casino Marketing, sought responses to a Las Vegas vacation offer. The other, Universal American Credit Card, wished to notify potential customers of its offer of a credit card. In each case, the ADAD played a pre-recorded message describing the offer, and invited the caller to call a designated number if interested. Hall Aff. (App., A75) In the two years he had used ADADs before the state filed suit, Hall had received an average of 25 responses a day per ADAD from individuals interested in further information about the offers described in the messages. Hall Aff. (App., A76)

Hall further stated, without contradiction by the state, that if he were forced to employ live operators to introduce the recorded message as the ADAD statute requires, the ADAD would be rendered essentially useless.[7] As a result, Hall would be compelled to employ a

[7] The Minnesota ADAD statute imposes a number of requirements and restrictions, but the most onerous in the First Amendment context is § 325E.27, which requires that the user either obtain prior consent for the call or employ a live operator, a requirement that, practically speaking, renders the ADAD useless. Petitioner does not contend that all restrictions on ADAD use (or other telephone solicitation techniques), such as time of day limitations, mandated exclusion of numbers of emergency entities, or a

much more expensive method of advertising or (as ultimately has happened) to go out of business altogether. Hall Aff. (App., A77)

Hall's situation is by no means unique. Ron and Kathryn Moser, owners of the Keizer, Oregon-based A-Aa-1 Lucky Leprechaun Co., have faced similar hurdles as small businesspeople in need of a cost-effective way to inform potential customers about their services. The Mosers started their chimney cleaning business in Salt Lake City, Utah, in 1986, with money Mrs. Moser received in early retirement from her former employer. Moser Testimony (App., A86); Carnevale, Wall Street Journal, January 20, 1993, at B1 (App., A116). In the beginning, Mrs. Moser trudged door-to-door distributing handbills and took out newspaper advertisements, but they had little success. Moser testimony (App. A87).

The Mosers' business improved dramatically after they rented an ADAD. Moser Testimony (App., A89). The ADAD brought in enough work during the first week of use to pay for its $436.50 rent for the month. *Id.* When in 1989 the Mosers decided to move to Oregon, they verified that Oregon law permitted ADADs. Carnevale, Wall Street Journal, January 20, 1993, at B1 (App., A116).

Two months after the Mosers moved to Oregon, however, the state enacted O.R.S. § 759.290, which prohibited businesses from soliciting the purchase of realty, goods, and services with ADADs. The Mosers

requirement that the machine have an automatic disconnect feature, would be constitutionally invalid.

were forced to discontinue using their ADAD, substantially diminishing their revenues. The Mosers had been attracting approximately 70% of their business from advertising through their ADAD. Moser Testimony (App., A93)

Like Hall, the Mosers challenged their state's ADAD statute. Unlike Hall, the Mosers have so far been successful. The Oregon Court of Appeals struck down the Oregon statute on the ground that it violated the Mosers' state constitutional right to free speech. *Moser v. Frohnmayer*, 829 P.2d 84 (Or. Ct. App.), *rev. granted*, 840 P.2d 709 (1992). In addition, they successfully moved the federal district court for a temporary injunction against enforcement of the federal act. *See* footnote 5 *supra*.

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI TO REVIEW PETITIONER'S CONSTITUTIONAL CHALLENGE TO THE MINNESOTA ADAD STATUTE BECAUSE ADADS ARE AN INTEGRAL COMPONENT OF SMALL BUSINESS COMMERCIAL SOLICITATION AND BECAUSE THE PREVALENCE OF ADAD LEGISLATION MAKES THIS AN ISSUE OF NATIONAL SIGNIFICANCE WHICH IS LIKELY TO RECUR.

The Minnesota Supreme Court's decision upholding the Minnesota ADAD statute raises constitutional questions of far-reaching importance about the protection of commercial speech directed to the home by telephone. More

than forty states, as well as the United States Congress, have enacted legislation severely restricting or banning altogether the use of ADADs. If left in place, the prohibitions effectuated by these statutes will continue to infringe upon the free speech rights of the petitioner and others engaged in the business of reaching prospective customers by telephone, as well as the rights of those customers to receive these commercial messages.

Indeed, the implications of this case go far beyond the question of whether small businesses will be permitted to use ADADs, because the rationale enunciated by state lawmakers and regulators to effectively prohibit their use -- the desire to protect residents from the "uniquely intrusive" nature of contacts by residential telephone -- is no less applicable to other means and contexts in which businesses and organizations may seek to reach prospective customers or contributors by telephone.

This Court noted in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981), that "[e]ach method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method." The instant case presents an important opportunity for the Court to consider a significant and timely issue it has not previously confronted -- the extent to which government may restrict the use of the telephone and telecommunications technology for widespread communication of a commercial message. Given the growing dependence of small business upon this method of advertising, and the pervasiveness of state and federal attempts to regulate in this area, the issue will recur, and constitutional guidance is needed. Under these circumstances, the Court should grant certiorari. *Cf. Simon & Schuster, Inc., v. New York Crime Victims*

Board, 112 S.Ct. 501, 508 (1991) (Court granted certiorari where "most of the States [had] enacted statutes with similar objectives" to that under attack, and the "issue [was] significant and likely to recur.")[8]

A. SMALL BUSINESS OWNERS RELY ON ADADS AS A VITAL PART OF THEIR OPERATIONS.

The cost-effectiveness of telemarketing has made it a vital and growing part of small business operations in the United States. Every day, over 180,000 solicitors call over 7 million Americans by telephone, generating $435 billion in total sales in 1990, up more than 400% since 1984. *See* S. Rep. No. 178, 102d Cong., 1st Sess., at 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. (102 Stat.) 1968, 1969-70. The growth in telemarketing sales can be traced in part to the expanding use of ADADs, which currently number about 70,000. Arcadi, Note, 1991 Colum. Bus. L. Rev. at 427.

As evidenced by the Mosers' experience, ADADs are especially useful for new companies just starting out. *Id.* Even Congress has recognized that regulation of ADADs may disproportionately burden small businesses. *See* 27 U.S.C. § 227(c)(4)(B)(iii) (FCC must consider

[8] It is noteworthy that this Court recently agreed to review the decision of the Sixth Circuit Court of Appeals in *Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464 (1991), *cert. granted*, 112 S. Ct. 1290 (1992), which addresses whether a local government may restrict substantially the dissemination of purely commercial publications in public places. Together, these two cases would allow the Court to clarify the status to be accorded commercial speech under the First Amendment, and the extent to which government may curtail the manner of dissemination of commercial messages in a mass-marketing economy.

effect on small businesses when promulgating regulations). It is not by happenstance, therefore, that the members of the National Association of Telecomputer Operators, an organization formed to advance the interests of ADAD users, are small businesses. Carnevale, Wall Street Journal, January 20, 1993, at B1 (App., A115); Arcadi, Note, 1991 Colum. Bus. L. Rev. at 428.

Because of ADADs' effectiveness and efficiency, any requirement that they may be used only in conjunction with a live operator will disproportionately affect small businesses or others who lack the resources to employ a live operator or to advertise in more traditional -- and expensive -- ways. Arcadi, Note, 1991 Colum. Bus. L. Rev. at 427-28. Furthermore, nothing in the rationale advanced for these regulations, if upheld, would preclude future, more sweeping restrictions of all telemarketing efforts, with gargantuan economic ramifications.

B. THE UNITED STATES CONGRESS AND MORE THAN FORTY STATES HAVE ENACTED LAWS WHICH SEVERELY CURTAIL ADAD USE OR BAN IT ALTOGETHER.

Congress and at least 42 state legislatures have enacted laws that either ban ADADs altogether or substantially restrict their use, particularly for commercial purposes. These restrictions are "virtually sounding the death knell for all commercial uses of automatic dialers across the country." Arcadi, Note, 1991 Colum. Bus. L. Rev. at 420.

The states with the most restrictive laws either ban ADADs outright or effectively prohibit their use for

commercial purposes.[9] For example, Arizona law bans ADADs for commercial purposes altogether:

> A person shall not use an automated system for the selection and dialing of telephone numbers and the playing of a recorded message for the purpose of soliciting persons to purchase goods or services or requesting survey information if the results are to be used directly for the purpose of soliciting persons to purchase goods or services.

Ariz. Rev. Stat. Ann. § 13-2919(A) (Supp. 1992).

The United States Congress has enacted legislation prohibiting ADADs for commercial purposes without the prior consent of the person called. The Telephone Consumer Protection Act, 27 U.S.C. § 227 (Supp. 1992), provides in relevant part:

> It shall be unlawful for any person within the United States to initiate any telephone call using an artificial or prerecorded voice to deliver a message

[9] *See* D.C. Code Ann. § 43-1418(a)(2) (Supp. 1992) (prohibiting ADADs to be used for the sole purpose of soliciting the purchase or lease of goods, services, or real property); Hawaii Rev. Stat. § 445-184(b) (Supp. 1992) (prohibiting the use of ADADs for the purpose of initiating solicitation telephone calls); Nev. Rev. Stat. Ann. § 598.075 (Michie Supp. 1991) (permitting ADADs to be used to solicit the purchase of goods and services if the owner has a preexisting business relationship with the party called); Or. Rev. Stat. § 759.290(1) (1991) (prohibiting ADADs to be used to solicit the purchase of realty, goods, or services); Va. Code Ann. § 18.2-425.1(A) (Michie 1988) (prohibiting ADADs to be used for initial sales contacts); Wash. Rev. Code Ann. § 80.36.400(2) (West 1991) (prohibiting ADADs to be used for commercial solicitations); Wyo. Stat. § 6-6-104(a) (1988)(prohibiting ADADs to be used to offer goods or services for sale).

> without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order of the [Federal Communications] Commission under paragraph (2)(B). . .

27 U.S.C. § 227(b)(1)(B).[10]

The act authorizes the commission to exempt certain categories of callers from its prohibitions, but it may not exempt unsolicited calls using prerecorded messages for commercial purposes. *Id.* § 227(b)(2)(B).[11] However, the language of the statute suggests that the party called may give prior consent to receive the recorded commercial message, making the law similar to the laws enacted in Alaska, Arkansas, Colorado, Kentucky, Louisiana, Maryland, Michigan, Montana, New Mexico, South Carolina, and Wisconsin, which prohibit commercial solicitation by ADAD without the consent of the party

[10] Ron and Kathryn Moser successfully moved to enjoin the enforcement of the Telephone Consumer Protection Act just two days after it took effect. *Moser v. FCC*, 61 U.S.L.W. 2387 (D. Or. January 5, 1993). The federal district court found that the act abridged their right to engage in commercial speech guaranteed by the First and Fourteenth amendments as defined in *Central Hudson Gas & Elec. Corp. v. Public Service Com'n*, 447 U.S. 557 (1980).

[11] Thus, the act only prohibits ADADs used for commercial purposes, but it permits the use of predictive dialers because they do not employ prerecorded messages. *See generally* James E. Meadows, *The Telephone Consumer Protection Act of 1991: Consumer Salvation or Unconstitutional Restraint?*, 9 Computer Law. 13 (1992).

called.[12] Other states, like Minnesota, provide that if prior consent is not obtained, an ADAD may be used only with a live operator.[13] Still other states require that ADAD users obtain permits,[14] or impose combinations of various other requirements.[15]

[12] See Alaska Stat. § 45.50.472 (1986); Ark. Code Ann. § 5-63-204(a)(3) (Michie 1987); Colo. Rev. Stat. Ann. § 18-9-311(1) (West Supp. 1992); Ky. Rev. Stat. Ann. § 367.461(2)(a) (Supp. 1992); La. Rev. Stat. Ann. § 45:811 (West Supp. 1992); Md. Code Ann. § 55C(c)(2) (Supp. 1992); Mich. Comp. Laws Ann. § 484.125(2) (West 1987); Mont. Code Ann. § 45-8-216(2) (1991); N.M. Stat. Ann. § 57-12-22(A) (Michie Supp. 1992); S.C. Code Ann. § 16-17-446(B)(1) (Law. Co-op Supp. 1992); Wis. Stat. Ann. § 134.72(2) (West Supp. 1991).

[13] *See* Ga. Code Ann. § 46-5-23(a) (Michie Supp. 1992); Ind. Code § 24-5-14-5 (Supp. 1992); Miss. Code Ann. § 77-3-455(2) (1989); N.C. Gen. Stat. § 75-30(b) (Supp. 1992); Okl. Stat. tit. 21, § 1847a(3) (West Supp. 1993); Tenn. Code Ann. § 47-18-1502(b) (Supp. 1992).

[14] New Hampshire, for example, authorizes solicitors to use ADADs if they register with the consumer protection and antitrust bureau of the state department of justice. N.H. Rev. Stat. Ann. § 359-E:2 (Supp. 1992). The message transmitted must identify the name of the person, company, or organization making the call and the purpose of the call and the goods or services being offered. *Id.* § 359-E:5. *See also* Fla. Stat. Ann. § 501.605(1) (West Supp. 1992); Id. Code § 48-1004 (Supp. 1992); Maine Rev. Stat. Ann. tit. 10, § 1498 (West Supp. 1992); Neb. Rev. Stat. § 87-308 (1992); R.I. Gen. Laws § 5-61-3 (Supp. 1992); S.D. Codified Laws § 37-30-25 (Supp. 1992); Tex. Rev. Civ. Stat. Ann. art. 113 (Supp. 1993); Utah Code Ann. § 13-25-3 (Supp. 1992).

[15] *See* Cal. Pub. Util. Code Ann. § 2874(a) (Supp. 1992) (permitting ADAD calls only when preceded by a live operator); Ct. Gen. Stat. Ann. § 16-256e (West Supp. 1992) (prohibiting the use of ADADs for transmitting any commercial, business, or advertising message if the ADAD continues the call and message after the customer hangs up the receiver); Ill. Ann. Stat. ch. 815, § 305/5 (Smith-Hurd Supp. 1992)(requiring live operator if it is not feasible for the ADAD to disconnect within 30 seconds); Iowa Code Ann. § 476.57 (Supp. 1992)(permitting ADAD calls if the initial prerecorded message

It is difficult to imagine an issue which, in terms of the economic consequences, the prevalence of state and federal legislation, and the unsettled nature of the law (as evidenced by the disagreement among the courts that have considered it), would present a more compelling candidate for resolution by this Court. Furthermore, as the following discussion will demonstrate, the result reached by the Minnesota Supreme Court cannot be reconciled with this Court's standards for the review of governmental restrictions of commercial speech in those areas most analogous to telephone solicitation.

II. MINN. STAT. § 325E.27, PROHIBITING THE USE OF AN ADAD FOR COMMERCIAL SOLICITATION WITHOUT THE USE OF A LIVE OPERATOR OR THE PRIOR CONSENT OF THE CALLED PARTY, VIOLATES PETITIONER'S RIGHT TO FREEDOM OF SPEECH UNDER THE FIRST AND FOURTEENTH AMENDMENTS.

While it has become routine to refer to commercial speech's "subordinate position in the scale of First Amendment values," *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978), this Court has nevertheless been steadfast in its recognition of the value of commercial speech to society. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748

lasts no longer than seven seconds before a live operator intercept or if the initial message is from a live operator); Mass. Gen. Laws Ann. ch. 159, § 19B (Supp. 1992)(permits a person to notify the telephone company not to allow ADAD calls to the person's telephone number); N.Y. Gen. Bus. Law § 399-p(3) (McKinney Supp. 1993)(requiring live operator and ADAD messages to make various disclosures).

(1976), the Court noted that speech uttered for solely economic motives has high value to those who listen to it. "As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 763.

The Minnesota Supreme Court's decision upholding the ADAD statute fails to acknowledge the essential value of commercial speech and cannot be reconciled with this Court's decisions about the scope and extent of First Amendment protection of such speech.[16]

The standards to be applied to this constitutional analysis were established in *Central Hudson Gas & Elec. Corp. v. Public Service Com'n*, 447 U.S. 557 (1980), and *Board of Trustees of S.U.N.Y. v. Fox*, 492 U.S. 469 (1989); *see also* Laurence H. Tribe, *American Constitutional Law* § 12 at 900 (2d ed. 1988).

[16] The Minnesota Supreme Court interpreted the statutory restrictions as applying only to the use of ADADs for commercial purposes. 491 N.W.2d at 886 ("it is clear that the regulatory scope of the ADAD statute is limited to commercial speech"). However, the language of the statute is not so clearly limited. It is true that the statute defines commercial telephone solicitation as a telephone call for the purpose of soliciting the purchase or the consideration of purchase of goods or services. Minn. Stat. § 325E.26, subd. 4. But, the statute prohibits any "caller" from using an ADAD unless the person called consents or a live operator introduces the recorded message. Id. § 325E.27. "Caller," in turn, is defined as any person or entity who attempts to contact or who contacts a subscriber by telephone or a telephone line, without reference or limitation to the defined term "commercial telephone solicitation." Id. § 325E.26, subd. 3. Therefore, the statute on its face is not limited to commercial speech and arguably applies to all speech. Without the supreme court's narrowing construction of the statute, the statute would be subject to additional constitutional challenges because of its restrictions on absolutely protected speech. *See Board of Trustees of S.U.N.Y. v. Fox*, 492 U.S. 469, 481-86 (1989).

Central Hudson and *Fox* establish at the outset that the state bears the burden of establishing the constitutionality of its restrictions on commercial speech. *See, e.g.*, *Fox*, 492 U.S. at 480 ("the State bears the burden of justifying its restrictions"). For the statute in this case to be constitutional, the state must satisfy *Central Hudson*'s four-part test:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern a lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566; *Fox*, 492 U.S. at 475 (reiterating the *Central Hudson* test).

The state of Minnesota has failed to satisfy this test with respect to the ADAD statute because it cannot demonstrate that the statutory requirements, particularly with respect to use of a live operator in the absence of prior consent, directly advance the state's interest and are no more extensive than necessary to serve it.

A. HALL'S COMMERCIAL SPEECH CONVEYED BY ADAD CONCERNED LAWFUL ACTIVITY AND WAS NOT MISLEADING, AND IS THEREFORE ENTITLED TO THE FULL PROTECTION ACCORDED COMMERCIAL SPEECH.

For commercial speech to enjoy First Amendment protection, it must concern a lawful activity and it may not be misleading. The Minnesota courts found insufficient evidence to support a finding that Hall's ADAD messages were misleading or that they concerned unlawful activity. Certainly there is nothing inherently misleading or unlawful about a message that happens to be conveyed by recording rather than by a live operator. Therefore, for purposes of this constitutional analysis, it must be assumed that Hall's messages were neither false nor misleading and therefore are entitled to the full measure of protection accorded commercial speech. *Casino Marketing*, 491 N.W.2d at 887; *Fox*, 492 U.S. at 475.

B. THE STATE'S INTERESTS IN PREVENTING FRAUD AND IN PRESERVING RESIDENTIAL PRIVACY ARE NOT DIRECTLY ADVANCED BY THE REQUIREMENT THAT A LIVE OPERATOR PARTICIPATE IN EVERY CALL.

In the proceedings below, the state presented two interests in justification of the statutory requirement that a live operator be used to introduce all commercial ADAD calls in the absence of prior consent. It argued that the requirement of a live operator advanced its interests in

preventing telemarketing fraud and in protecting the privacy of consumers' homes.[17] *Casino Marketing*, 491 N.W.2d at 887-88. In fact, the requirement fails to advance either interest.

1. The State's Interest in Preventing Consumer Fraud Is Not Directly Advanced by the Requirement of a Live Operator.

The Minnesota Supreme Court rejected the state's argument that the live operator requirement of the statute advanced its interests in preventing telemarketing fraud. As the court noted:

> As long as the mandated disclosures are placed at the beginning of the ADAD generated commercial solicitation and are understandable, it seems to us the state's substantial interest in fraud prevention would be served equally well whether the disclosures be made by a live operator or a prerecorded message. Indeed, a skilled live operator might well subvert the aims of the disclosures if given the opportunity to engage the subscriber in conversation.

[17] For purposes of this proceeding, petitioner accepts that the state has legitimate and substantial interests both in preventing consumer fraud and in protecting the privacy of consumers in their homes. As is discussed *infra*, however, petitioner does not accept that the live operator and prior consent requirements of the ADAD statute advance those interests or are narrowly tailored to accomplish them.

Id. at 888. Thus, the live operator requirement of the ADAD statute cannot be sustained by reliance upon the state's interest in preventing consumer fraud.

2. The State's Interest in Preserving Residential Privacy Is Not Directly or Properly Advanced by a Statute Which Effectively Precludes Customers From Receiving ADAD-Conveyed Messages.

Having found the state's interest in preventing fraud insufficient to justify the ADAD statute, the Minnesota court based its blessing of the statute upon the notion that the live operator requirement advanced the state's interest in preserving residential privacy against the onslaught of unwanted contacts via the "uniquely intrusive" residential telephone. *Id.* at 888. In so finding, the court misapplied this Court's commercial speech precedents and overlooked the numerous ways in which the statutory requirement fails to efficiently advance the espoused privacy interest while it forecloses the most practical way for many small businesses to get their messages out to potential customers.

a. The State May Not In the Name of Privacy Enact a Presumption Against a Recipient's Choice to Receive Otherwise Lawful and Non-Deceptive Messages.

The presumption underlying the state's and the Minnesota court's rationale in this case is that societal interest in residential privacy requires the government to protect residents from the inconvenience of receiving

commercial messages by telephone unless the residents affirmatively volunteer to receive such messages. Such a presumption is constitutionally invalid.

This Court's series of decisions in cases involving attempts to restrict the dissemination of certain materials by mail is instructive. In *Lamont v. Postmaster General of the United States*, 381 U.S. 301 (1965), the Court considered a federal statute that authorized postal officials to hold an addressee's mail which the officials believed the addressee would find offensive, until the addressee affirmatively requested the postal service in writing to deliver the mail. *Id.* at 306-07. The Court struck down the statute as violative of the First Amendment. *Id.* at 307. In the Court's view, Congress could not set "administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail." *Id.* at 306. The addressee could take steps to stop the receipt of mail deemed offensive, but the postal service could not erect a barrier up front because it would impede the delivery of mail even to willing recipients. *Id.* at 310; *see also Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 72 (1983) (the government may not shut off the flow of mailings to protect potentially offended recipients).

The Court expanded upon this analysis in *Rowan v. United States Post Office Dept.*, 397 U.S. 728 (1970), which involved a statute that permitted a potential recipient to require the sender to remove his name from the sender's mailing lists. Unlike *Lamont*, it was the potential recipient, not postal officials or legislators, who determined whether he should continue receiving the materials. *Id.* at 730. The Court upheld the statute on the grounds

that "a mailer's right to communicate must stop at the mailbox of an unreceptive addressee." *Id.* at 736-37.

The principle that pervades and harmonizes the *Rowan* and *Lamont* opinions is that the government cannot make blanket, paternalistic determinations about the material and information individuals want to receive.

> In operative effect the power of the householder under the statute is unlimited; he may prohibit the mailing of a dry goods catalog because he objects to its contents--or indeed the text of the language touting the merchandise. Congress provided this sweeping power not only to protect privacy but to avoid possible constitutional questions that might arise from vesting the power to make any discretionary evaluation of the material by a governmental official.

Rowan, 397 U.S. at 737; *see also Troyer v. Town of Babylon*, 483 F. Supp. 1135, 1138-39 (E.D.N.Y.)("To override strong first amendment interests, the individual desiring privacy must assume the burden of indicating the choice to be left alone."), *aff'd*, 628 F.2d 1346 (2d Cir.), *aff'd*, 449 U.S. 988 (1980).

To enact in the name of residential privacy a statute which has the intended effect of reducing or precluding communications by those who employ ADADs is strictly forbidden by *Rowan* and *Lamont*. By requiring telemarketers like Hall, or small businesspeople like the Mosers, either to obtain consent or to precede recorded messages with a live operator, the state impermissibly legislates a presumption that individuals do not want to receive information in recorded message form.

Thus, while the state's interest in the privacy of its citizens may well motivate it to take steps to see that unreceptive residents are not harassed by telephone calls, the constitutionally appropriate response is not to establish a presumption that consumers do not want to receive ADAD calls; rather, like *Rowan*, the state should prescribe and enforce a mechanism by which consumers who choose not to entertain such calls may make those choices known to potential solicitors who will be bound to honor them.

This Court's decisions addressing prohibitions on in-person solicitation are not inconsistent with this approach. In *Breard v. City of Alexandria*, 341 U.S. 622 (1951),[18] this Court upheld a city ordinance outlawing "the practice of going in and upon private residences" by solicitors and peddlers of merchandise without prior request of the resident. *Id.* at 624. The Court rejected the argument that the resident should be required to post a sign setting forth his willingness or unwillingness to receive solicitors, noting that the sign would need to be a "small billboard" to communicate who was welcome and who was not. *Id.* at 640. The Court concluded that the First Amendment does not force residents to permit solicitors into their homes. *Id.* at 645.[19]

[18] It should be noted that *Breard* predated *Central Hudson*, and seems to approve a far more extensive regulation of commercial speech than would now be allowed under *Central Hudson*. As a result, the continuing viability of *Breard* is in question. Nevertheless, it is not inconsistent with the position advanced by petitioner.

[19] *Frisby v. Schultz*, 987 U.S. 474 (1988), is also not contrary to petitioner's position. In Frisby, two individuals challenged a city ordinance that banned all picketing "before or about" any residence, but the Court upheld the ordinance. As in *Breard*, the ordinance sought to prohibit in-person intrusions into the privacy of one's home. The Court was particularly

The instant case is much more like the mail cases than the in-person soliciting and picketing cases. Here, a consumer need only hang up the telephone receiver to cut off the unwanted solicitation and to communicate who is welcome and who is not. Unlike the situation in which a person is standing at the consumer's door or lurking continuously in front of the house, with a telephone call the consumer retains virtually complete control over the duration of the contact. The consumer simply needs to place the receiver on the hook to terminate any intrusion purportedly caused by the telephone call. *Cf. Bolger*, 463 U.S. at 72 ("the short, though regular, journey from mail box to trash can is an acceptable burden, at least so far as the Constitution is concerned")(citations omitted).

b. The Live Operator Requirement of the ADAD Statute Does Not In Fact Directly Advance the Interest of the State in Preserving Residential Privacy.

Aside from the constitutional impermissibility of a presumption that individuals do not want to receive certain messages, the requirements of the ADAD statute with regard to live operator involvement and prior consent do not in fact directly advance the asserted privacy interest.

In effect, the statute seeks to reduce the total number of telephone calls, and therefore the total imposition on those being called, simply by making telephone solicitation prohibitively expensive for a certain class of

struck by the "captive" nature of a homeowner whose home had been singled out for picketing, as opposed to picketing generally on the street or about the neighborhood.

callers. On the other hand, anyone who can afford a live operator can make as many and as intrusive calls as they wish, limited only by the time of day restrictions in §325E.30 (and even those restrictions do not apply to non-commercial solicitations). There is no basis whatsoever to conclude that ADAD calls made with pre-recorded messages without a live operator are more intrusive than live operator calls. In actuality, many individuals may prefer a recorded message because they would find it easier to hang up on a machine. *See Casino Marketing*, 491 N.W.2d at 892 (Tomljanovich, J., dissenting); Riordan, *Dread Ringers*, Washington Post Magazine, February 23, 1992 (App. A130).

The Minnesota statute also excludes from its purview telephone solicitors such as charities, churches, colleges, universities, and other fundraisers. Minn. Stat. §325E.26, subd. 4. Consequently, consumers may be bombarded with ADAD calls from any number of organizations so long as the caller just asks for money and does not offer to sell anything in return. In fact, the statute even appears to permit the solicitation of the purchase of goods or services by ADAD if done on behalf of a charitable or religious organization.

Furthermore, the statute permits calls from solicitors with whom the person called has a preexisting business relationship. See Minn. Stat. § 325E.27. Thus, the statute permits commercial ADAD calls from credit card companies, magazine companies, car companies, banks, doctors, grocery stores, and all manner of other entities with which the consumer has previously done business. Repeated telephone solicitations from these entities, whether from live operators or from ADADs, will

annoy and disturb the privacy of consumers to the same extent as the solicitation banned by the ADAD statute.

In short, while the Minnesota Supreme Court concluded that ADAD calls should be circumscribed because telephones are "uniquely intrusive" into the privacy of the home, requiring live operators or prior consent only for commercial ADAD calls does not diminish the intrusive effect of such calls, regardless of whether they are wanted or unwanted and regardless of whether the calls solicit money. The state cannot advance its interests simply by choosing which calls it believes are more or less intrusive, *see Lamont*, 381 U.S. at 306, or by erecting financial barriers which reduce the number of calls because of the limited resources of the callers.[20]

The court below, citing *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), argued that the state need not "eradicate all evils that offend" its interests in order for the statutory scheme to pass constitutional muster. 491 N.W.2d at 890. But while *Metromedia* accorded considerable deference to legislative choices among alternatives and evils,[21] nothing in that case scuttled the requirement that the state's interest must be

[20] This Court has taken into consideration the degree to which any given restriction on communicative activity falls unevenly on various economic groups, and has scrutinized such restrictions with special care. *See, e.g., Martin v. City of Struthers*, 319 U.S. 141, 146 (1943) ("Door to door distribution of circulars is essential to the poorly financed causes of little people.")

[21] It is important to note, as did the Sixth Circuit in *Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464, 470 n. 9 (1991), that *Metromedia* was only a plurality opinion and therefore of only limited assistance in describing this Court's approach to commercial speech.

directly advanced by the restriction at issue. In that case, there was a direct connection between the city's interest in the reduction of billboards for aesthetic and traffic safety reasons, and the ordinance banning all billboards that were not located directly on the property of the advertiser. The Court also found that, while it was not perfect, it was "perhaps the only effective approach to solving the problems." *Id.* at 510.

By contrast, in this case the state's interest in protecting the privacy of the consumer's home bears only an incidental relationship to the most onerous of the requirements of the ADAD statute. The disruption of privacy occurs, if at all, regardless of whether the call is made by a live operator or an ADAD. Furthermore, as will be discussed below, there are more narrowly tailored alternative approaches that would address many of the state's concerns regarding ADAD calls. The ADAD statute does not meet the third prong of the *Central Hudson* test and it must therefore fall.

3. The Requirements of the ADAD Statute Are Far More Onerous and Extensive than Necessary to Serve the State's Interest in the Privacy of its Citizens.

Finally, respondent must demonstrate that the ADAD statute is no more extensive than necessary to serve the state's interests. *See Central Hudson*, 447 U.S. at 566. While the state need not use the least restrictive alternative, there must be a "reasonable fit" between the legislature's ends and the means chosen to accomplish those ends. *Fox*, 492 U.S. at 480. Hence, respondent

must show that the ADAD statute is narrowly tailored to advance its interest in protecting privacy. *Id.*

The Minnesota ADAD statute is not narrowly tailored to achieve the state's interest. On the contrary, there are a number of alternatives much better suited to addressing the state's expressed concerns, and which would have a much less draconian effect on the ability of small businesses to use ADADs to get their messages out. For example, the Minnesota Supreme Court expressed legitimate concerns about reported incidents of ADADs calling hospital rooms or cellular phones, or tying up phone lines by failing to disconnect immediately after the person being called had hung up. 491 N.W.2d at 889. However, current model machines may be programmed to eliminate all inappropriate telephone numbers. While the court suggests that not everyone is using these newer machines, *id.*, the state could require that users avail themselves of these features as a condition to ADAD use, and could penalize calls to proscribed numbers.

Similarly, newer machines have the capability to disconnect calls within one second after the other party hangs up. That not everyone uses a machine with this feature does not justify the live operator requirement. Instead, he state can and should enforce a provision that requires this disconnect feature.

The court below essentially ignored these alternatives and stated conclusorily that "the ADAD statute posits no blanket proscriptions on computer generated commercial telephone solicitation, but rather it narrowly regulates those facets of ADAD use that are most susceptible to violating privacy." This conclusion is not supported by the facts. On the contrary, there is a total mismatch

between the impact of the requirement of a live operator and the state's interest in limiting purportedly intrusive phone calls. A state may not discriminate against and infringe upon commercial speech just because its interest may be marginally served by banning certain means of disseminating the information.

In *Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464 (6th Cir. 1991), *cert. granted*, ___ U.S. ___, 112 S. Ct. 1290 (1992), the Sixth Circuit analyzed the "reasonable fit" requirement of *Central Hudson*, and commented on the value that must be attributed to commercial speech in balancing the cost of the restrictions (in free speech terms) against the benefits to the state's professed interest. The court noted that this Court has accorded a high value to commercial speech where, as here, it is not misleading and where the state is not attempting to regulate adverse effects flowing directly from the commercial content of the speech itself. *Id.* at 471. Commercial speech may not be singled out for curtailment simply for efficiency's sake. *Id.*

Here, the statute seeks to place a burden on commercial speech because of alleged harms caused by the manner of delivering it. Yet, when one compares the loss to Hall and other ADAD users as a result of these restrictions with the incidental and largely theoretical enhancement of privacy, and considers the alternatives which would more directly address many of the state's concerns without effectively foreclosing ADAD use, the "fit" between the current statutory scheme and the state's privacy interest simply cannot be described as "reasonable," "narrowly tailored," or "not more extensive than necessary to serve that interest." The statute is therefore unconstitutional.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests the Court to grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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STATE OF MINNESOTA

IN SUPREME COURT

No. C1-91-598

State of Minnesota, by its Attorney General, Hubert H. Humphrey, III,

Respondent,

vs.

Casino Marketing Group, Inc.

Defendant,

Larry J. Hall, a/k/a "Bud Hall" d/b/a "721 Associates" and d/b/a "Associated Marketing,"

Appellant,

and

State of Minnesota, by its Attorney General, Hubert H. Humphrey, III,

Respondent,

vs.

Universal American Credit Card Inc.,

Respondent,

Larry J. Hall, a/k/a "Bud Hall" d/b/a "721 Associates" and d/b/a "Associated Marketing,"

Appellant.

November 6, 1992

SYLLABUS

The time, place, and manner requirements of Minn.Stat. §§ 325E.26-.31, which regulate commercial telephone solicitations by an automatic dialing-announcing device (ADAD), meet the standards set out in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980): The government interest in the protection of privacy in the home is substantial; the time, place, and manner requirements directly advance the protection of residential privacy, and the regulation is narrowly drawn and is not more excessive than necessary to serve that interest.

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Robert M. Lindstrom, Minneapolis, for Universal American Credit Card, Inc.

John Riemer, MCLU Volunteer Atty., St. Paul (Deborah Gilman, Legal Counsel, Minnesota Civil Liberties Union, Minneapolis, of counsel), for amicus curiae.

Heard, considered and decided by the court en banc.

COYNE, Justice.

We examine whether the trial court's issuance of a temporary injunction enjoining Hall from using automatic dialing-announcing devices (ADADs) in contravention of

Minn.Stat. §§ 325E.26-.31[1] during the pendency of this

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[1] AUTOMATIC DIALING-ANNOUNCING DEVICES

325E.26 DEFINITIONS.

Subdivision 1. **Scope.** The terms used in sections 325E.26 to 325E.30 have the meanings given them in this section.

Subd. 2. **Automatic dialing-announcing device.** "Automatic dialing-announcing device" means a device that selects and dials telephone numbers and that, working alone or in conjunction with other equipment, disseminates a prerecorded or synthesized voice message to the telephone number called.

Subd. 3. **Caller.** "Caller" means a person, corporation, firm, partnership, association, or legal or commercial entity who attempts to contact, or who contacts, a subscriber in this state by using a telephone or a telephone line.

Subd. 4. **Commercial telephone solicitation.** "Commercial telephone solicitation" means any unsolicited call to a residential subscriber when the person initiating the call has not had a prior business or personal relationship with the subscriber, and when the purpose of the call is to solicit the purchase or the consideration of purchase of goods or services by the subscriber. Commercial telephone solicitation does not include calls initiated by organizations listed in section 290.21, subdivision 3, clauses (a) to (e).

Subd. 5. **Subscriber.** "Subscriber" means a person who has subscribed to telephone service from a telephone company or the other persons living or residing with the subscribing person.

325E.27 USE OF PRERECORDED OR SYNTHESIZED VOICE MESSAGES.

A caller shall not use or connect to a telephone line an automatic dialing-announcing device unless: (1) the subscriber has knowingly or voluntarily requested, consented to, permitted, or authorized receipt of the message; or (2) the message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered. This section and section 325E.30 do not apply to (1) messages from school districts to

proceeding violates the first amendment of the United States *Constitution or article I, section 3 of the Minnesota* Constitution. The court of appeals concluded that the ADAD statute withstands commercial speech scrutiny. We affirm.

ADADs are machines that select telephone numbers by computer program and dial those numbers consecutively, at random, or at predetermined intervals (e.g., every tenth

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students, parents, or employees, (2) messages to subscribers with whom the caller has a current business or personal relationship, or (3) messages advising employees of work schedules.

325E.28 REQUIREMENTS ON AUTOMATIC DIALING-ANNOUNCING DEVICES.

A caller shall not use an automatic dialing-announcing device unless the device is designed and operated so as to disconnect within ten seconds after termination of the telephone call by the subscriber.

325E.29 MESSAGE REQUIREMENTS.

Where the message is immediately preceded by a live operator, the operator must, at the outset of the message, disclose: (1) the name of the business, firm, organization, association, partnership, or entity for which the message is being made; (2) the purpose of the message; (3) the identity or kinds of goods or services the message is promoting; and (4) if applicable, the fact that the message intends to solicit payment or commitment of funds.

325E.30 TIME OF DAY LIMIT.

A caller shall not use an automatic dialing-announcing device nor make any commercial telephone solicitation before 9:00 a.m. or after 9:00 p.m.

325E.31 REMEDIES.

A person who is found to have violated sections 325E.27 to 325E.30 is subject to the penalties and remedies, including a private right of action to recover damages, as provided in section 8.31.

number). If the machine selects a number that is busy, it disconnects and immediately dials the next programmed number, returning to the previously engaged number at a later time. If the machine reaches a telephone to which no one responds, it disconnects after a predetermined number of rings and returns to that number at a later time. If the machine reaches a telephone to which a subscriber responds, a prerecorded message is played. Should the subscriber hang up in the course of the message, defendant Hall claims the machine automatically disconnects and dials the next programmed number. Should the subscriber listen to the entire message, he or she will be provided telephone numbers to call for further information. According to defendant Hall ADADs can be programmed to exclude the telephone numbers of persons who do not want to be called by the machine.

Each ADAD machine is capable of making up to 1,500 telephone calls per day. The record does not reveal how many ADADs Hall operates, but he states that during November and December 1990 he was able to place from 28,000 to 32,000 ADAD generated calls per day. Hall alleges these calls resulted in approximately 25 positive responses per day per machine.

In response to several complaints, including those made by the patients and staff of Abbott-Northwestern Hospital, the Minnesota Attorney General's Office Consumer Division conducted an investigation which revealed that ADAD generated telephone calls originated from Hall's house in St. Paul, Minnesota. After an investigator from the attorney general's office had made several unsuccessful attempts to speak to him, the state ordered Hall to appear at a deposition, but he refused to do so without compensation.

Hall does business as 721 Associates and Associated Marketing--organizations which distribute commercial telephone solicitations. Casino Marketing Group, Inc., based in Nevada, and Universal American Credit Card, Inc., based in Texas, engaged Hall's service, providing him with a prerecorded sales message to be conveyed by telephone. The Nevada-based business hoped to locate persons who would purchase a travel package to Las Vegas and the Texas-based business hoped to locate persons with no credit history or a poor credit rating who would purchase its credit cards and attendant goods.

On October 30, 1990 the state served on Hall a summons and complaint in which he and Casino Marketing Group, Inc. were named defendants and a summons and complaint in which he and Universal American Credit Card, Inc. were named defendants. In both actions the state sought a declaration that Hall's conduct violates Minn.Stat. §§ 325E.26-.31, an order enjoining defendants from using ADADs in violation of the statute, and a monetary award. Pursuant to Minn.Stat. § 8.31, subd. 3, the state concurrently brought a motion for a temporary injunction to enjoin Hall's use of ADADs pending trial on the merits. Hall counterclaimed under 42 U.S.C. § 1983, arguing that the ADAD statute is unconstitutional on its face and as applied on the ground that it violates the first amendment of the United States Constitution and Minnesota Constitution article I, section 3.[2] He sought a declaration that the statute

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[2]In *State v. Century Camera, Inc.*, 309 N.W.2d 735, 738 n. 6 (Minn.1981), a case concerning commercial speech, this court stated, "The protection of freedom of speech guaranteed by Minn. Const. art. I, § 3 is no more extensive in this case than the protection provided by the first amendment to the United States Constitution." Because we are in general accord with the United States Supreme Court's declination to extend the full force of free speech protection to commercial speech and because, beyond peradventure, the speech at issue is

is unconstitutional, an order enjoining enforcement of the statute, and money damages.

The cases were consolidated for a hearing on the merits of cross motions for a temporary injunction. On April 4, 1991 the trial court, finding that the statute was consonant with commercial speech protection, temporarily enjoined Hall from using his ADADs for commercial solicitation; the court of appeals affirmed.

The standards for issuance and review of a temporary injunction are well established. *See Thompson v. Barnes*, 294 Minn. 528, 200 N.W.2d 921 (1972); *Dahlberg Bros., Inc. v. Ford Motor Co.*, 272 Minn. 264, 137 N.W.2d 314 (1965). Hall, however, does not challenge the trial court's order on grounds that the state failed to show the traditional prerequisites for issuance of a temporary injunction, but instead argues that the statute on which the temporary injunction is grounded violates free speech principles on its face and as applied.

Because the record is not fully developed, we cannot adjudicate conclusively the merits of the state's contention that the messages disseminated by Hall's ADADs are false or misleading. In limiting its review to that appropriate for a temporary injunction motion, the trial court concluded that the evidence before it was insufficient to ascertain whether the speech sponsored by Casino Marketing Group, Inc. and Universal American Credit Card, Inc. was false and misleading and whether the ADAD statute would result in a

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commercial speech, we see no reason to interpret the two constitutional provisions differently for the purposes of this case. Thus, this decision's reference to the first amendment should be read as also referencing Minn. Const. art. I, § 3.

"total loss" of income from commercial telephone solicitation. Inasmuch as the record accompanying a temporary injunction is necessarily limited and because the state moved for a temporary injunction in response to conduct which neither party argues fell outside the provisions of the ADAD statute, absence of a complete factual record does not provide any basis for overturning the trial court's ruling on the temporary injunction motions. At the same time, of course, we cannot make factual determinations, and we leave them to the appropriate finder of fact. Nonetheless, we may--and indeed must--deliberate on whether the ADAD statute passes first amendment scrutiny.

At the outset, we reject the court of appeals' determination that the trial court properly concluded that in the face of first amendment challenges Minn.Stat. §§ 325E.26-.31 enjoy a presumption of constitutionality which remains in force until the contrary is established beyond a reasonable doubt. *State v. Casino Marketing Group, Inc.*, 475 N.W.2d 505, 508 (Minn.App.1991). Although this presumption of constitutionality is well established in the ordinary case, *see, e.g., Dimke v. Finke*, 209 Minn. 29, 32, 295 N.W. 75, 78 (1940), "any provision of law restricting [first amendment] rights does not bear the usual presumption of constitutionality normally accorded to legislative enactments." *Johnson v. State Civil Service Dept.*, 280 Minn. 61, 66, 157 N.W.2d 747, 751 (1968); *see also Alexander v. City of St. Paul*, 303 Minn. 201, 211, 227 N.W.2d 370, 375 (1975). The presumption of constitutionality cannot be reconciled with the unique protections afforded by the first amendment. The principle enunciated in *Johnson* is equally compelling when the speech affected is commercial speech, for a strong presumption in favor of the constitutionality of a statute governing commercial speech would run an unacceptable risk of

chilling protected speech. The district court's error of law, however, neither necessarily invalidates its holding nor prohibits this court from reaching the merits of this controversy; rather, in light of Hall's legitimate free speech challenge, we proceed with the understanding that the state bears the burden of establishing the statute's constitutionality.

When contemplating first amendment challenges, the level of judicial scrutiny varies with the type of speech at issue. Minn.Stat. §§ 325E.26-.31 (1990) and the injunction grounded on them bear only upon commercial speech. Commercial speech has been characterized as speech which "does 'no more than propose a commercial transaction,'" *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762, 96 S.Ct. 1817, 1825, 48 L.Ed.2d 346 (1976)(quoting *Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376, 385, 93 S.Ct. 2553, 2558, 37 L.Ed.2d 669 (1973)), or as "expression related to the economic interests of the speaker and its audience." *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 561, 100 S.Ct. 2343, 2349, 65 L.Ed.2d 341 (1980). We need not, however, linger on definitional nuances, for whatever the characterization of commercial speech, it is clear that the regulatory scope of the ADAD statute is limited to commercial speech. Sections 325E.26-.31 regulate the use of ADADs for

> '[C]ommercial telephone solicitation' [--i.e.,] any unsolicited call to a residential subscriber when the person initiating the call has not had a prior business or personal relationship with the subscriber, and when the purpose of the call is to solicit the purchase

or the consideration of purchase of goods or services by the subscriber.

Minn.Stat. § 325E.26, subd. 4 (1990). The statute goes on to except from the definition of "commercial telephone solicitation" "calls initiated" by charitable, religious, educational, and other "organizations listed in section 290.21, subdivision 3, clauses (a) to (e)." *Id.*

Minn.Stat. § 325E.27 (1990) proscribes use of an ADAD unless the subscriber has knowingly or voluntarily requested or consented to receive the message, or unless the message is immediately preceded by a live operator who obtains the subscriber's consent before delivering the prerecorded message. Neither the prohibition in section 325E.27 nor the time limitations set out at section 325E.30 apply to "(1) messages from school districts to students, parents or employees; (2) messages to subscribers with whom the caller has a current business or personal relationship; or (3) messages advising employees of work schedules." Of course, none of the three types of messages excepted from application of section 325E.27 come within the statutory definition of "commercial telephone solicitation," regardless of the content of the message. In each situation the person or entity initiating the call has what can be characterized as an existing business or personal relationship with the recipient. Minn.Stat. § 325E.26-.31 regulates only the use of ADADs to disseminate unsolicited messages which are designed to stimulate the purchase of goods or services for the seller's profit, speech which falls squarely within the confines of any definition of commercial speech.

Although the defendants challenge the constitutionality of Minn.Stat. §§ 325E.26-.31 as it is

applied to their use of ADADs, their contention is based on the premise that the statute imposes a prior restraint on speech. It is important to observe, however, that although the ADAD statute regulates a type of commercial speech, it does not ban it. Rather, the statute posits reasonable time, place, and manner restrictions. The time of day limitation provides that a "caller shall not use an automatic dialing-announcing device nor make any commercial telephone solicitation before 9 a.m. or after 9 p.m." Minn.Stat. § 325E.30 (1990). The ADAD statute owes its existence in large measure to "place" considerations: no place that houses a telephone--be it home, hospital, hotel room, or business quarters and whether the telephone number is listed or unlisted--is immune from intrusion by ADAD. Minn.Stat. § 325E.28 provides that any ADAD in use be designed and operated so as to disconnect within 10 seconds after the subscriber terminates the call, thus assuring that the subscriber's line will be open in the event of an emergency. Finally, and most importantly, Minn.Stat. §§ 325E.27 and 325E.29 (1990) restrict the manner in which ADADs may be used to disseminate commercial speech: either the subscriber must consent in advance or the prerecorded message must be immediately preceded by a live operator, who must disclose the name of the entity for which the message was made, the purpose of the message, the kind of goods or services being promoted, and, if applicable, the fact that payment will be solicited, and then must obtain the subscriber's consent to delivery of the prerecorded message.[3]

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[3]Minnesota is hardly alone in voicing concern over the proliferation of ADADs. The federal government and over 40 states have enacted legislation limiting the use of ADADs. S.Rep. No. 178, 102d Cong., 1st Sess. 3 (1991), U.S.Code Cong. & Admin.News 1991, pp. 1968, 1970. The authors of the federal statute which regulates use of ADADs--the Telephone Consumer Protection Act of 1991 (effective December 20, 1992)--chose not to limit its regulatory scope to commercial speech, but rather, among other things, banned

Although the statute proposes time, place, and manner restrictions, ultimately the appropriate level of scrutiny of the statute depends on the variety of speech at issue. *See* Rotunda, Nowak, Young, *3 Treatise on Constitutional Law: Substance and Procedure 33* (1986).

Both the United States Supreme Court and this court have stopped far short of extending absolute free speech protection to commercial speech: "Commercial speech is given 'a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, * * * allowing modes of regulation that might be impermissible in the realm of noncommercial expression.'" *State v. Century Camera, Inc.*, 309 N.W.2d 735, 739 (Minn.1981)(quoting *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456, 98 S.Ct. 1912, 1918, 56 L.Ed.2d 444 (1978)). Accordingly, we have adopted the *Central Hudson* test, with its balancing of interests, for assessing the constitutionality of commercial speech regulation:

> For commercial speech to come within [first amendment protection], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and

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all computer generated calls to homes unless such a call is made for emergency purposes or the subscriber consents in advance to it. 47 U.S.C.A. § 227(b)(1)(B). Thus, the act does not permit ADAD communication to homes even if such communication is introduced by a live operator and it extends to noncommercial speech. The authors anticipate that any constitutional challenge to the act will fail because it posits valid time, place, and manner restrictions. S.Rep. No. 178, 102d Cong., 1st Sess. 4 (1991). The act does not preempt state ADAD regulations. 47 U.S.C.A. § 227(e)(1).

whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Electric Corp., 447 U.S. at 566, 100 S.Ct. at 2351. This court has repeatedly invoked the *Central Hudson* test in ascertaining the constitutionality of commercial speech regulation, doing so most recently in *Minnesota League of Credit Unions v. Minn. Dept. of Commerce*, 486 N.W.2d 399 (Minn.1992).

If, as the state alleges, it should ultimately be determined that the defendants' messages are false or misleading, then they are not entitled to any first amendment protection. *Central Hudson*, 447 U.S. at 563, 100 S.Ct. at 2350. The truth or falsity of defendants' prerecorded messages has not, however, yet been determined; therefore, for purposes of this opinion, we assume that they are neither false nor misleading.

Irrespective of the veracity of the content of the defendants' travel package and credit card solicitation, it is clear that the ADAD statute contemplates restricting the dissemination of truthful commercial speech by automatic dialing-announcing devices. To undertake regulation "[t]he State must assert a substantial interest to be achieved by restrictions on commercial speech." *Central Hudson Gas & Electric Corp.*, 447 U.S. at 564, 100 S.Ct. at 2350. The state asserts two substantial interests underlying Minn.Stat. §§ 325E.26-.31: protection of privacy in the home and prevention of telemarketing fraud. We conclude that the state has a substantial interest in both respects. *See Frisby v. Schultz*, 487 U.S. 474, 484-85, 108 S.Ct. 2495, 2502, 101 L.Ed.2d 420 (1988)("[A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions.");

Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 636, 100 S.Ct. 826, 835, 63 L.Ed.2d 73 (1980)(the governmental interest in protecting the public from fraud is "indeed substantial").

Although the ADAD statute undoubtedly deters telemarketing fraud, we conclude that the requirement which the defendants assert is most onerous, that a live operator introduce an ADAD generated prerecorded commercial solicitation, has little relationship to its fraud deterrence features. The disclosures to be made by a live operator are designed to minimize the opportunity for fraud, but although the requirement of disclosure is not constitutionally infirm in itself, *see Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651, 105 S.Ct. 2265, 2281, 85 L.Ed.2d 652 (1985), the requirement that these disclosures be made by a live operator does little, if anything, to directly advance the state's interest in fraud prevention. As long as the mandated disclosures are placed at the beginning of an ADAD generated commercial solicitation and are understandable, it seems to us the state's substantial interest in fraud deterrence would be served equally well whether the disclosures be made by a live operator or a prerecorded voice. Indeed, a skilled live operator might well subvert the aims of the disclosures if given the opportunity to engage the subscriber in conversation. Thus, it is doubtful that the ADAD statute would pass constitutional muster were the prevention of fraud the only legitimate interest to be served.

But although the ADAD statute appears only incidentally to further the state's interest in fraud prevention, it directly advances the state's interest in protecting residential privacy. The necessity for protecting residential privacy is driven not so much by offensiveness of the content of the message as by the coupling of commercial telephone

solicitation with a startlingly efficient and indiscriminate medium of distribution,[4] so that the resulting *method* of conveying commercial speech intolerably encumbers fundamental notions of residential privacy.

The telephone is unique in its capacity to bring those outside the home into the home for direct verbal interchange--in short, the residential telephone is uniquely intrusive. The caller, who can convey messages which very young children can understand, is able to enter the home for expressive purposes without contending with such barriers as time or distance, doors or fences. We do not take this verbal presence lightly: "The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality, * * * * * " *Rowan v. Post Office Dept.*, 397 U.S. 728, 737, 90 S.Ct. 1484, 1490, 25 L.Ed.2d 736 (1970). Moreover, the shrill and imperious ring of the telephone demands immediate attention. Unlike the unsolicited bulk mail advertisement found in the mail collected at the resident's leisure, the ring of the telephone mandates prompt response, interrupting a meal, a restful soak in the bathtub, even intruding on the intimacy of the bedroom. Indeed, for the elderly or disabled, the note of urgency sounded by the ring of the telephone signals a journey which may subject the subscriber to the risk of injury. Unlike the radio or the television, whose delivery of speech, either commercial or noncommercial, depends on the listener's summons, the telephone summons the subscriber,

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[4]Public Law 102-243 (1991), the Telephone Consumer Protection Act of 1991, includes Congress' finding that: "More than 300,000 solicitors call more than 18,000,000 Americans everyday." 105 Stat. 2394, § 2(3) (1991). "[I]f you had 193 [ADADs], they would be able to call every home in the U.S. once a week." Congressman Les Aspin, quoted in U.S. News & World Rep., Sept. 11, 1987 at 44.

depriving him or her of the ability to select the expression to which he or she will expose herself or himself.

As Justice William O. Douglas observed in his concurring opinion in *Lehman v. City of Shaker Heights*, 418 U.S. 298, 307, 94 S.Ct. 2714, 2719, 41 L.Ed.2d 770 (1974)(statute prohibiting political advertisements on city buses held a valid time, place, and manner restriction), "the petitioner overlooks the constitutional rights of the commuters. * * * * [H]e has no right to force his message upon an audience incapable of declining to receive it." But, contend the defendants here, the subscriber is quite capable of declining to receive an ADAD generated commercial telephone solicitation. The subscriber need only hang up the telephone. Although it is true that the subscriber can elect not to listen to the entire sales message, Justice Douglas' "captive audience" observation is nevertheless appropriate here because the subscriber has been forced to answer the telephone and receive at least part of the message before he or she can hang up on the unsolicited call. Inasmuch as the interior of the subscriber's home is not a public forum, reasonable time, place and manner regulation of unsolicited commercial telephone solicitation ought to be permissible.

Minn.Stat. § 325E.26-.31 (1990) is not directed at all persons who communicate by telephone but only at those who choose to advertise goods and services by dispensing ADAD generated messages over telephone lines. In two fundamental ways, ADAD generated telephone calls differ from telephone calls generated by live operators: in a very short period of time ADADs reach an astonishing number of households selected at random. Using ADADs, Hall claims to have reached 28,000 to 32,000 telephones per day. Furthermore, this immense volume of telephone calls is

controlled by machines which have no ability to differentiate.[5] Should the machine engage a number, it almost unfailingly delivers its message to a child,[6] to the subscriber who pays for an unlisted telephone number,[7] to an answering machine, to a fax machine, or to the owner of a cellular telephone, who must pay for the call. Moreover, although Hall alleges that his ADADs comply with the statutory requirement that ADADs disconnect within 10 seconds after the subscriber hangs up, the less sophisticated but more popular ADADs continue to engage the

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[5]The United States Senate report lists the following problems with ADAD use:

. automated calls are placed to lines reserved for emergency purposes, such as hospitals and fire and police stations;

. the entity placing the automated call does not identify itself;

. the automated calls fill the entire tape of an answering machine, preventing other callers from leaving messages;

. the automated calls will not disconnect the line for a long time after the called party hangs up the phone, thereby preventing the called party from placing his or her own calls;

. automated calls do not respond to human voice commands to disconnect the phone, especially in times of emergency;

. some automatic dialers will dial numbers in sequence, thereby tying up all the lines of a business and preventing any outgoing calls; and

. unsolicited calls placed to fax machines, and cellular or paging telephone numbers often impose a cost on the called party (fax messages require the called party to pay for the paper used, cellular users must pay for each incoming call, and paging customers must pay to return the call to the person who originated the call).

S.Rep. No. 178, 102d Cong., 1st Sess. 2 (1991), U.S.Code Cong. & Admin.News 1991, p. 1969.

[6]One ADAD, for example, managed to sell a subscription to *Playboy* to a 3-year-old. Barron, *Junk Phone Calls: Danger on the Line?*, N.Y. Times, May 29, 1988, § 1, at 36, col. 1.

[7]It might be supposed that an unlisted telephone number represents a request that the subscriber not be bombarded by unsolicited sales pitches. Not so.

subscriber's telephone until the entire message has been played, rendering the subscriber's telephone inoperable for the duration of the message. One mother in Amsterdam, New York is said to have nearly lost her child because of an ADAD's failure to disconnect. When the child became ill, the mother tried to summon help by telephone only to be met by a prerecorded sales pitch. Because attempts to hang up on the inexorable message were futile, the mother saved her child by running to a neighbor's home to call for an ambulance.[8]

By requiring a live operator to introduce commercial telephone solicitations, the ADAD statute reasonably accommodates two fundamental interests: it balances the value of disseminating commercial telephone solicitations with remarkable efficiency against the value of residential privacy and it counteracts the indiscriminate dispensing of commercial telephone solicitations. Requiring a live operator to introduce ADAD generated commercial solicitation undoubtedly adversely affects ADAD's capacity to transmit messages ceaselessly. Inasmuch as the intrusiveness of commercial telephone solicitation flows in large measure from the necessity of immediate response to the ring of the telephone, this reduction in the efficiency with which commercial telephone solicitations are made directly and not unreasonably advances the state's interest in protecting residential privacy. Moreover, by requiring live operators to initiate commercial solicitation by telephone, the statute addresses the inescapable fact that machines cannot ascertain the propriety of proceeding with a message, and it

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[8]Barron, *Junk Phone Calls: Danger on the Line?*, N.Y. Times, May 29, 1988, § 1, at 36, col. 1.

thereby further directly advances the state's interest in the maintenance of privacy.

The contention that the ADAD statute fails to directly advance the state's interest because commercial telephone solicitations generated by live operators intrude upon privacy to the same extent as ADAD generated commercial telephone solicitations is overly simplistic. The quality of intrusion by commercial telephone solicitation initiated by a live operator differs from that of an ADAD generated call although the degree to which privacy is invaded by any particular call may be the same. Nevertheless, this observation is just an observation, for it is not dispositive of whether the ADAD statute directly advances the state's interest in protecting privacy. A regulation of commercial speech does not fail to directly advance the state's substantial interest merely because it does not eradicate all the evils that offend that interest. In *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), the Supreme Court applied the *Central Hudson* test to that portion of a city ordinance that prohibited offsite billboards which disseminated commercial speech, but that allowed onsite billboards which disseminated commercial speech. In response to the argument that onsite advertising is as offensive to aesthetics and safety as offsite advertising, the Court noted, (1) onsite advertising aside, the prohibition of the ordinance of offsite billboards directly advances the state's objectives of promoting safety and aesthetics; (2) the city is free to believe that offsite advertising is a more acute problem than onsite advertising; and (3) the city is free to value one variety of dispensing commercial speech more highly than another. *Id.* at 510-12, 101 S.Ct. at 2893-95. *See also Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 342-43, 106 S.Ct. 2968, 2977-78, 92 L.Ed.2d 266 (1985)(statute which prohibits casino gambling

advertising within Puerto Rico directly advances the state's interest even though advertising of other forms of gambling is permitted).

Similarly misplaced is the contention that the ADAD statute fails to directly advance the state's interest because telephone solicitations by charitable and other organizations listed in section 290.21, subdivision 3, clauses (a) to (e) are excepted from the definition of "commercial telephone solicitation." Charitable solicitation aside, the restriction on ADAD use directly advances the state's objective of protecting residential privacy by reducing the number of unsolicited commercial telephone calls. The state is free to believe that commercial telephone solicitation is a more acute problem than charitable telephone solicitation; and the legislature is free to determine that in the light of Minnesotans' recognized sense of community, the enhancement of the quality of life in this state by charitable contributions is of greater value than generating profit through commercial telephone sales messages. *Metromedia, Inc. v. City of San Diego*, 453 U.S. at 510-12, 101 S.Ct. at 2893-95. In *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 106 S.Ct. 2968, a casino prohibited from advertising its gambling facilities inside Puerto Rico challenged the advertising restrictions as underinclusive because other kinds of gambling such as horse racing, cock fighting, and the lottery could be advertised to residents of Puerto Rico. The Supreme Court held that "whether other kinds of gambling are advertised in Puerto Rico or not, the restrictions on advertising of casino gambling 'directly advance' the legislature's interest in reducing demand for games of chance." 478 U.S. at 342, 106 S.Ct. at 2977. Because horse racing, cock fighting, small games of chance at fiestas, and the lottery were traditionally part of the Puerto Rican culture, the Court viewed the separate classification of

casino gambling, for purposes of the advertising ban, as satisfying the third step of the *Central Hudson* analysis. 478 U.S. at 343, 106 S.Ct. at 2977. And as the Supreme Court said in *Metromedia*, it does not follow from the fact that the state has concluded that the support of organizations listed in section 290.21, subdivision 3, clause (a) to (e) outweigh its interest in residential privacy, that it must give similar weight to commercial telephone solicitation. *Metromedia*, 453 U.S. at 512, 101 S.Ct. at 2895.

It behooves us to remember that when the legislature chooses to restrict commercial speech, it is not required to impose restrictions that protect the state's substantial interest absolutely. ADADs' method of propagating expression, for reasons that are not merely speculative, runs an especially acute risk of intruding on residential privacy. By drafting narrowly tailored restrictions which curtail particularly offensive aspects of ADAD use, the legislature, acting well within the realm of reason, directly advanced the state's substantial interest in protecting privacy.

The fourth and final prong of the *Central Hudson* test requires that the means of advancing the governmental interest be "not more extensive than necessary." *Id.* 447 U.S. at 566, 100 S.Ct. at 2351. This is not a "least restrictive means" test, but rather requires that the regulation be narrowly tailored to achieve its purpose:

> What our decisions require is a '"fit" between the legislature's ends and the means chosen to accomplish those ends,'--a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' that employs not necessarily the least restrictive means

> but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 480, 109 S.Ct. 3028, 3035, 106 L.Ed.2d 388 (1989)(citations omitted).

We are satisfied that sections 325E.25-.31 are "narrowly tailored to achieve the desired objective." *Id.* The ADAD statute does not restrict commercial solicitation by live operator, nor does it prohibit commercial solicitation by ADAD. Absent advance consent, it requires that the ADAD operator introduce the tape-recorded message by a live operator, that the live operator make certain disclosures, and that the live operator call at a decent hour. The ADAD statute posits no blanket proscriptions on computer generated commercial telephone solicitation, but rather it narrowly regulates those facets of ADAD use that are most susceptible to violating privacy. *See Metromedia, Inc.*, 453 U.S. at 508, 101 S.Ct. at 2893; *Posadas de Puerto Rico Association*, 478 U.S. at 343-44, 106 S.Ct. at 2977-78. As such, it is carefully calculated to advance the state's substantial interest in protecting privacy, and thus withstands scrutiny under the fourth prong of the *Central Hudson* test.

Having concluded that the ADAD statute does not unconstitutionally offend commercial speech protection, we hold that Minn.Stat. §§ 325E.26-.31 meet the standards set out in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980): Assuming that the defendants'

prerecorded messages are neither false nor misleading and are, therefore, entitled to constitutional protection, the government interest in the protection of privacy in the home is substantial; the time, place, and manner requirements directly advance the protection of residential privacy, and the regulation is narrowly drawn and is not more excessive than necessary to serve that interest. Because this is an interlocutory appeal, we remand to the trial court for conclusion of the proceedings, with the expectation that the finder of fact will determine whether the prerecorded messages in question are accurate and nondeceptive or whether they are false and misleading.

Affirmed.

TOMLJANOVICH, Justice (concurring in part and dissenting in part).

I share the majority's frustration with intrusive telephone solicitations. But I do not agree that the provision requiring that a live operator obtain consent before a message is played complies with the freedom of speech requirements placed on the states by the First and Fourteenth Amendments. Therefore, I respectfully dissent from the portions of the majority's opinion which hold that the live operator provisions are constitutional.

I agree with the majority that the state may place more restrictions on commercial speech than on political speech. I also agree that the provisions mandating that ADAD's disconnect within ten seconds after termination of the call by the recipient and limiting the use of ADAD's to certain hours of the day are constitutional because they further the state's substantial interest in protecting privacy and safety.

I do not believe, however, that the live operator requirements are constitutional. Under *Central Hudson*, if commercial speech is not deceptive, the state can regulate it only to further a substantial state interest. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564, 100 S.Ct. 2343, 2350, 65 L.Ed.2d 341 (1980). I heartily agree with the majority that the state has a substantial interest in protecting the privacy of its citizens.

But even when the state demonstrates a substantial interest, a statute regulating commercial speech must "directly advance" that interest to be valid. *Id.* A regulation of commercial speech "may not be sustained if it provides only ineffective or remote support for the government's purpose." *Id.* The majority holds that the privacy interest being advanced is the interest in being free of interruptions from "the shrill and imperious ring of the telephone." But the live operator requirements advance that interest only incidentally, if at all. Once the person being called picks up the telephone, the interruption of privacy already has occurred. At that point, from a privacy perspective, it makes no difference whether the caller is a person or a machine. The damage to privacy is done, and the solution is the same in either situation: hang up the telephone. In this respect, Casino's solicitations are quite possibly less intrusive than live callers: I suspect that most people can hang up on a machine more easily and more quickly than they could on a live operator. Thus, I believe this is precisely the type of "ineffective" regulation discussed in *Central Hudson* because, in all likelihood, the live operator requirement actually intrudes upon rather than protects privacy.

The majority also argues that by forcing telephone solicitors to hire live operators, fewer calls will be made and

the privacy of the citizens will be protected. But this regulation allows those who use ADAD's to make just as many calls as before if they are willing to hire live operators. Thus, I do not see how this requirement protects privacy. It simply makes commercial speech more expensive than it would be without the live operator requirement.

Finally, *Central Hudson* requires that regulation of commercial speech must not be "more extensive than is necessary" to serve the state's substantial interest. *Id.* at 566, 100 S.Ct. at 2351. That language has recently been construed to mean that the limitation on speech must be a "reasonable fit" to the state interest being advanced. *Board of Trustees, State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 3034, 106 L.Ed.2d 388 (1989). The live operator requirements fail on this ground as well. When the live operator requirements are subjected to any meaningful level of judicial scrutiny, it is clear that they do not further the state's interest in protecting the privacy of its citizens. I simply cannot imagine how a statute that does not directly advance and perhaps impedes the state's purported interest can possibly meet the "reasonable fit" requirement of Fox.

I respectfully dissent and would hold the live operator requirements unconstitutional.

STATE OF MINNESOTA

IN COURT OF APPEALS

No. C1-91-598

Ramsey County District Court #C6-90-12442 and #C6-90-12443 — Forsberg, Judge

State of Minnesota, by its Attorney General, Hubert H. Humphrey, III,

Respondent,

vs.

Casino Marketing Group, Inc.

Defendant,

Larry J. Hall, a/k/a "Bud Hall" d/b/a "721 Associates" and d/b/a "Associated Marketing,"

Appellant,

and

State of Minnesota, by its Attorney General, Hubert H. Humphrey, III,

Respondent,

vs.

Universal American Credit Card Inc.,

Respondent,

Larry J. Hall, a/k/a "Bud Hall" d/b/a "721 Associates" and d/b/a "Associated Marketing,"

Appellant.

October 8, 1991

SYLLABUS

The trial court did not abuse its discretion by enjoining appellant's use of automatic-dialing announcing devices which did not precede the recorded solicitations with a live operator identifying the entity for which the call was made, explaining the message's purpose, identifying the services or goods being promoted, and obtaining the consumer's consent, as required by Minn. Stat. §§ 325E.27 and .29 (1990).

Hubert H. Humphrey, III, Atty. Gen. and James Paul Jacobson, Sp. Asst. Atty. Gen., St. Paul, for the State.

Randall D.B. Tigue, Minneapolis, for appellant.

Robert M. Lindstrom, Minneapolis, for Universal American Credit Card, Inc.

Considered and decided by PARKER, P.J., and FORSBERG, and AMUNDSON, JJ.

OPINION

FORSBERG, Judge.

Larry Hall appeals from the trial court's grant of respondent State of Minnesota's motion for a temporary injunction prohibiting him from using automatic-dialing announcing devices (ADADs). We affirm.

FACTS

Hall is a Minnesota resident doing business under the names "721 Associates" and "Associated Marketing." He is

also the agent for Casino Marketing Group, Inc., a Nevada corporation, and Universal American Credit Card, Inc., a Texas corporation. Hall's businesses include conducting commercial telephone solicitations for the sale of travel services and credit cards to Minnesota consumers, as defined in Minn.Stat. § 325E.26, subd. 4 (1990). These telephone solicitations are placed by ADADs which deliver prerecorded voice messages. The solicitations are placed without a live operator to announce the business' name, explain the message's purpose, or identify the services or goods being promoted. The calls are also placed without the prior consent of the called persons. It is undisputed that this type of telephone solicitation violates Minn.Stat. §§ 325E.27 and .29.

Upon discovering the unlawful solicitations, the state commenced two actions to enjoin Hall. A state investigator alleges by affidavit that during 1990, the attorney general received 805 written complaints concerning telemarketing, 60 of which involved prerecorded telephone solicitations.

In his affidavit, Hall claims his sole source of income is from using the ADADs. He acknowledges ADADs can be programmed to exclude telephone numbers of those who do not want unsolicited calls. Further, he insists enforcement of the present statute, which requires a live operator, removes any advantage from using ADADs.

The two cases were consolidated for hearing. Hall argued the statutory restrictions on using ADADs are facially unconstitutional and unconstitutional as applied to him. He also sought an injunction to restrain the state from enforcing the statute.

In granting the state's temporary injunction motion, and implicitly denying Hall's cross-motion, the trial court concluded: (1) Hall will unlikely prevail on his constitutional claim; (2) nothing about the parties' relationship favors injunctive relief to Hall; (3) the state's public policy concerns in protecting its citizens outweighs Hall's interest in using the ADADs; and (4) no administrative burdens would hinder effective enforcement and supervision of the temporary injunction.

ISSUE

Did the trial court abuse its discretion by granting a temporary injunction restricting Hall's use of ADADs for commercial telephone solicitations?

ANALYSIS

The grant of a temporary injunction rests within the sound discretion of the trial court, and its decision will not be disturbed on appeal unless there has been an abuse of such discretion. *Cherne Indus., Inc. v. Grounds & Assocs., Inc.*, 278 N.W.2d 81, 91 (Minn.1979). In determining whether to reverse or affirm a grant of temporary injunction, an appellate court considers five factors: (1) the nature and background of the parties' relationship; (2) the relative harms to be suffered by the parties; (3) the likelihood of success on the merits; (4) public policy concerns; and (5) administrative burdens involved in judicial supervision and enforcement. *Dahlberg Bros., Inc. v. Ford Motor Co.*, 272 Minn. 264, 274-75, 137 N.W.2d 314, 321-22 (1965).

The critical issue in this case is whether the state will likely succeed on its claim that Hall should be permanently enjoined. This issue in turn depends upon whether Hall will

succeed in his claim that the ADAD statute violates the first amendment. The first amendment extends protection to commercial speech. *Bigelow v. Virginia*, 421 U.S. 809, 821, 95 S.Ct. 2222, 2232, 44 L.Ed.2d 600 (1975). Commercial speech, however, only enjoys a limited measure of constitutional protection and is therefore subject to regulation impermissible in the realm of noncommercial expression. *Board of Trustees v. Fox*, 492 U.S. 469, 472, 109 S.Ct. 3028, 3033, 106 L.Ed.2d 388 (1989)(quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456, 98 S.Ct. 1912, 1918, 56 L.Ed.2d 444 (1978)).

The Supreme Court has set forth a four-part test to determine the lawfulness of restrictions on commercial speech. A court must determine whether (1) the speech deserves first amendment protection, (2) the asserted governmental interest is substantial, (3) the limitation "directly" advances the asserted governmental interest, and (4) the limitation is not more extensive than "necessary" to serve the governmental interest. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980). A restriction on commercial speech must pass each of these to be constitutionally permissible. We believe the trial court in this case did not err in concluding Minn.Stat. §§ 325E.26-.31 likely meets the *Central Hudson* test, and therefore acted within its discretion in granting the state's temporary injunction motion.

First, illegal or misleading speech does not deserve constitutional protection. *Id.* at 563, 100 S.Ct. at 2350. While the state claims the telephone solicitations in this case are misleading, the trial court concluded there was insufficient evidence at this stage of the proceedings to make such a determination. We therefore do not reach this issue.

Of course, should the trial court find the solicitations are misleading, they would deserve no constitutional protection.

The second inquiry is whether the asserted governmental interests in restricting the use of ADADs are substantial. The statute requires that a live operator obtain the consumer's consent, explain the message's purpose, identify the services or goods promoted, and identify the entity for which the call is made before the outset of the recorded message. Minn.Stat. §§ 325E.27 and 29. The state offers two interests to justify these restrictions: to protect the privacy expectations of its citizens and to prevent fraudulent or misleading telephone solicitations.

We believe these interests are substantial. Citizens should enjoy a heightened degree of privacy in their own homes, and intrusions into residential privacy, such as the unsolicited telephone advertisements in this case, require immediate attention. *See, e.g., Fox*, 492 U.S. at 475, 109 S.Ct. at 3032 (preserving residential tranquility provides substantial governmental interest to prohibit demonstration of commercial product in university dormitories in face of first amendment challenge); *Bread v. City of Alexandria*, 341 U.S. 622, 645, 71 S.Ct. 920, 934, 95 L.Ed. 1233 (1951) (court upheld conviction for selling magazine subscriptions in violation of city ordinance outlawing door-to-door solicitation). In addition, the state has a substantial interest in preventing deceptive advertising and ensuring consumers receive accurate information when a telemarketer presents a solicitation.

With respect to the third inquiry, we conclude the requirement of a live operator advances the state's interests in privacy and preventing fraud. By requiring a live operator, the ADAD statute permits the consumer to decide

at the beginning of the call whether the solicitation is worth interrupting her activities. Further, the consumer may ask questions of the operator to make informed decisions about the solicitation. In addition, by identifying the entity for which the call is made and explaining the call's purpose, the operator may alert the consumer to overreaching and deceptive sales practices.

Finally, the statutory restrictions on ADAD solicitations are not more extensive than necessary to serve the state's interests. This inquiry requires a reasonable "fit" between the legislature's aim and the means chosen to accomplish it. *Fox*, 492 U.S. at 480, 109 S.Ct. at 3035. The fit does not necessarily require the least restrictive means; instead, the means must be "in proportion to the interest served." *Id. (quoting In re R.M.J.*, 455 U.S. 191, 203, 102 S.Ct. 929, 937, 71 L.Ed.2d 64 (1982)). In view of the intrusive effect of ADAD solicitations and the potential for fraud and overreaching, the legislature's decision to require a live operator amounts to a reasonable fit.

Two corollary issues also require our attention. First, Hall argues the trial court applied the improper legal standard in examining the validity of the ADAD statute. The trial court concluded a strong presumption exists in favor of a statute's constitutionality and a statute's invalidity must be proved beyond a reasonable doubt. *See Minneapolis Fed'n of Teachers v. Obermeyer*, 275 Minn. 347, 356, 147 N.W.2d 358, 365 (1966). Generally, this presumption of constitutionality does not apply to laws restricting first amendment rights. *Johnson v. State Civil Serv. Dep't*, 280 Minn. 61, 66, 157 N.W.2d 747, 751 (1968). Nonetheless, plain commercial speech is not granted the high standard of protection other first amendment rights receive. *Fox*, 492

U.S. at 472, 109 S.Ct. at 3033. For this reason, statutes restricting commercial speech properly bear a strong presumption of constitutionality.

Second, Hall argues the ADAD statute is a prior restraint. Prior restraints on speech are not tolerated. *See, e.g., New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971). However, unlike illegal prior restraints, which entirely suppress the distribution of the protected communication, the ADAD statute in this case merely regulates the manner by which certain telephone solicitations may be presented to consumers.

DECISION

The trial court acted within its discretion by enjoining appellant's use of ADADs for commercial telephone solicitations.

Affirmed.

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

Case Type: Other Civil
Consumer Protection

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

State of Minnesota,
by its Attorney General,
Hubert H. Humphrey, III,

Plaintiff, Court File No. C6-90-12442

v.

Casino Marketing Group, Inc.,
and Larry J. Hall, a/k/a
"Bud Hall" d/b/a "721 Associates"
and d/b/a "Associated Marketing,"

Defendants.

State of Minnesota,
by its Attorney General,
Hubert H. Humphrey, III,

Plaintiff, Court File No. C6-90-12443

v.

Universal American Credit
Card, Inc., and Larry J. Hall,
a/k/a "Bud Hall" d/b/a
"721 Associates" and d/b/a
"Associated Marketing,"

Defendants.

These matters were heard by the undersigned on January 22, 1991, pursuant to motions on behalf of the plaintiff and on behalf of the defendants for Temporary Injunctions against each adverse party. The plaintiff seeks to enjoin the defendants and their employees, successors, assigns and all persons acting in concert or participation with them from doing, directly or indirectly, those acts set forth in its Amended Notice of Motion and Motion filed on November 28, 1990. The defendants seek to enjoin the plaintiff and his agents, officers, employees and all persons acting under his direction and control from enforcing those provisions of Minnesota Statutes as set forth in the Motion of Larry J. Hall for Temporary Injunction dated November 14 and filed November 26, 1990.

The plaintiff was represented by James P. Jacobson, Esq., Special Assistant Attorney General. Defendant Larry J. Hall was represented by his attorney, Randall D. B. Tigue, Esq., and Robert M. Lindstrom, Esq., appeared on behalf of Defendant Universal American Credit Card, Inc.

Upon all of the files, records and proceedings herein, and upon the briefs, memoranda and arguments of counsel, the Court now makes the following:

FINDINGS OF FACT

1. Defendant Larry J. Hall is also known as "Bud" Hall and is a Minnesota resident who lives at 884 Mound Street in St. Paul, Minnesota. He does business under the names of "721 Associates" and "Associated Marketing."

2. Defendant Casino Marketing Group, Inc. (hereinafter referred to as "CMG"), is a Nevada corporation

with its principal place of business at 2300 Paseo Del Prado A-20, Las Vegas, Nevada. Defendant Larry J. Hall is an agent for CMG through whom it does business in Minnesota.

3. Defendant Universal American Credit Card, Inc. (hereinafter referred to as "UACC"), is a Texas corporation with its principal place of business at 807 Forest Ridge Road, Suite 103, Bedford, Texas. Defendant Larry J. Hall is an agent for UACC through whom it does business in Minnesota.

4. Defendants CMG and Hall have, during the calendar year 1990 and at other times relevant herein since 1988, conducted commercial telephone solicitations, as defined in Minn. Stat. 325E.26, subd. 4 (1990), for the sale of travel services to Minnesota consumers. During that same time period, Defendants UACC and Hall have conducted such commercial telephone solicitations for the sale of credit cards to Minnesota consumers.

5. Defendants' commercial telephone solicitations referred to in paragraph 4 have been placed by the use of automatic dialing-announcing devices, as defined in Minn. Stat. 325E.26, subd. 2 (1990), which deliver prerecorded or synthesized voice messages to the numbers called without using a live operator to obtain the consumer's consent before the message is delivered and without making the disclosures required by Minn. Stat. 325E.29 (1990) at the outset of such solicitations.

6. Defendants' commercial telephone solicitations referred to in paragraphs 4 and 5 have been placed without the use of a live operator to announce the name of the business or the purpose for which the message is being delivered, to identify the kinds of goods or services being

promoted by the solicitation, and to state that the message intends to solicit the payment or commitment of funds, and they have been placed without the prior consent or authorization of the persons called.

7. The State of Minnesota, through the offices of the plaintiff herein, has received complaints from Minnesota residents about the telephone solicitations they have received as described in paragraphs 4, 5, and 6 above. Approximately 805 complaints about telemarketing, including those about unsolicited, prerecorded telephone solicitations, were received in 1990 and, as demonstrated in the affidavits (which the Court finds credible) offered in support of plaintiff's Motions for Temporary Injunction, many have been about the calls placed by the defendants.

8. The evidence is insufficient at this stage of the proceedings to sustain a finding that the defendants' commercial telephone solicitations are, as a matter of law, not entitled to constitutional protections.

9. The State of Minnesota has a substantial interest in upholding the expectations of privacy of its citizens, who are at the same time subscribers to telephone service, and it has a substantial interest in protecting its citizens from fraudulent or misleading business practices that affect them as consumers.

10. The provisions of Minn. Stat. sections 325E.26-.31 (1990)(hereinafter referred to as the "ADAD statutes") constitute a reasonable restriction or regulation of commercial telephone solicitations which are prerecorded, unsolicited, and accomplished by automatic dialing-announcing devices, and those provisions directly advance the governmental interests found in paragraph 9.

11. The evidence is insufficient at this stage of the proceedings to sustain an independent finding that compliance with the ADAD statutes by defendants would result in a "total loss" of income from their business of commercial telephone solicitation, but their claim of such effect is not thus far contested by the plaintiff.

12. Defendants, by the manner in which they conduct their business of commercial telephone solicitation as described above, are in violation of the provisions of the ADAD statutes.

13. To the extent any of the following "Conclusions of Law" set forth below are seen rather as "Findings of Fact," they are hereby incorporated herein.

CONCLUSIONS OF LAW

1. To the extent any of the "Findings of Fact" set forth above are seen rather as "Conclusions of Law," they are hereby incorporated herein.

2. Pursuant to Minn. Stat. sections 8.31 and 325E.31 (1990), the plaintiff is entitled to an Order of this Court temporarily enjoining the defendants, and each of them, and their agents, employees, successors and assigns, and all persons acting in concert or participation with them either directly or indirectly from conducting the business of commercial telephone solicitation, as defined in Minn. Stat. section 325E.26, subd.4 (1990), in violation of, and without complying with, the requirements of Minn. Stat. sections 325E.26-.31 (1990).

3. The provisions of Minn. Stat. sections 325E.26-.31 (1990) are presumed to be constitutional, and

that presumption continues until the contrary is established beyond a reasonable doubt. It is unlikely that the defendants will be successful in establishing at trial that said statutory provisions are violative of any constitutional principles or deprive the defendants of any constitutionally-protected rights. It is likely that the plaintiff will prevail.

4. The plaintiff has not acted arbitrarily or abusively in enforcing the provisions of Minn. Stat. sections 325E.26-.31 (1990) against the defendants and with Defendant Hall conceding that his commercial telephone solicitations do not comply with those statutory requirements, nothing about the relationship between the parties favors injunctive relief for the defendants.

5. Enforcement of the ADAD statutes as to the defendants will not deprive them of the right to deliver the same commercial messages as they now deliver; enjoining such enforcement, even on a temporary basis, would impair the State's substantial interest in protecting its citizens. The State's interests outweigh those of the defendants in a consideration of equitable injunctive relief.

6. Public policy as established by the State for the protection of its citizens favors the enforcement of the ADAD statutes against the defendants, and no administrative burdens that would hinder or prevent effective supervision and enforcement are seen to exist.

7. The plaintiff is entitled to an Order of this Court denying defendants' Motion pursuant to Rule 65 of the Minnesota Rules of Civil Procedure for a Temporary Injunction of the Plaintiff's enforcement of the ADAD statutes against them.

ORDER

1. The defendants, and each of them, and their agents, employees, successors and assigns, and all other persons acting in concert or participation with them, either directly or indirectly, are hereby temporarily enjoined from:

A. Using an automatic dialing-announcing device to contact Minnesota consumers, or to originate calls within Minnesota, in violation of Minn. Stat. sections 325E.26-.31 (1990);

B. Using an automatic dialing-announcing device for commercial telephone solicitations without obtaining the consumer's knowing or voluntary consent or without preceding the message by a live operator who obtains the consumer's consent;

C. Using an automatic dialing-announcing device for commercial telephone solicitations without disclosing through a live operator the name of the business for which the message is made, the purpose of the message, the identity or kinds of goods or services the message is promoting and the fact that the message intends to solicit payment or commitment of funds.

2. The attached Memorandum is incorporated herein by reference.

Dated: April 4, 1991.

By the Court

George O. Peterson
Judge of District Court

MEMORANDUM

Though authorities cited by the plaintiff in support of its motion for a statutory injunction do not include any Minnesota cases, those cited from other jurisdictions are persuasive in support of its position. See, State ex rel. Edmisten v. Challenge, Inc., 284 S.E.2d 333 (N.C. Ct. App. 1981), Conway v. Mississippi St. Bd. of Health, 252 Miss. 315, 173 So.2d 412 (1965), State v. O.K. Transfer Co., 215 Or. 8, 330 P.2d 510 (1958), State v. Sirois, 478 A.2d 1117 (Me. 1984) and Ackerman v. Tri-City Geriatric and Health Care, 55 Ohio St.2d 51, 378 N.E.2d 145 (1978).

Included within this authority is the proposition that traditional requirements for the issuance of an equitable injunction need not be established to grant a statutory injunction that is mandated when activity or conduct proscribed by the statute is occurring. As is true in the instant case, the statutory injunction invoked is for the purpose of benefiting society as a whole, not to prevent or redress a wrong alleged by one individual at the hands of another. Of course, the elements and requirements of a traditional, equitable injunction must be considered in evaluating the defendants' motions in light of the claims that the commercial speech herein is constitutionally protected.

It is also true, however, that Defendant Hall has raised the issue of the constitutionality of the ADAD statutes at a proper time and in a proper manner by claiming they both are facially invalid and are being applied to deprive him of the right of free speech - constitutionally protected commercial speech.

It is clear that commercial speech, like other forms of communication, is entitled to First Amendment protections. Bates v. State Bar of Arizona, 433 U.S. 350 (1979), Virginia State Bd. of Pharmacy v. Virginia Citizens Council, Inc., 425 U.S. 748 (1976) and State v. Century Camera Inc., 309 N.W.2d 735 (Minn. 1981).

However, commercial speech enjoys a more limited amount of protection and is subject to regulation that might be impermissible for noncommercial speech. See, Orhalik v. Ohio State Bar Ass'n., 436 U.S. 447 (1978), Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980) and Lehman v. Shaker Heights, 418 U.S. 298 (1974).

And, of course, commercial speech which is misleading or deceptive is afforded no constitutional protection, and the state may regulate such speech without violating the First Amendment. Virginia State Bd. of Pharmacy v. Virginia Citizens Council, Inc., 425 U.S. 748 (1976). A detailed examination of the merits of the controversy between the parties on this subject is, however, beyond the scope of inquiry for the purposes of this proceeding. It is sufficient at this point to say that the defendants' commercial speech is not as a matter of law disqualified from constitutional protection. The evidence is not that clear.

This court then moves on to an evaluation of the elements and requirements of the traditional equitable injunction requested by Defendant Hall. And the emphasis here is on the parties' likelihood of success on the merits of their respective claims at trial.

It is a fundamental rule of law, repeated in a volume of cases, that there exists a strong presumption in favor of the constitutionality of a legislative enactment. See, e.g., United States v. Carolene Products, 304 U.S. 144 (1938), Dimke v. Finke, 209 Minn. 29, 295 N.W. 75 (1940), Sverkerson v. City of Minneapolis, 204 Minn. 388, 283 N.W. 555 (1939) and Re Petition of N.C.B. Careers, Inc., 298 N.W.2d 526 (S.D. 1980). These cases also make it clear that legislation will not be declared unconstitutional until its invalidity is proved beyond a reasonable doubt. Obviously, the defendants here have that burder. See, Minneapolis Federation of Teachers v. Obermeyer, 275 Minn. 347, 147 N.W.2d 358 (1966), State ex rel. Clinton Falls Nursery Co. v. Steele County Bd. of Commrs., 181 Minn. 427, 232 N.W. 737 and Simpson v. Mankato, 117 Minn. 458, 136 N.W. 264. The burden is one of showing that the legislative act is arbitrary and unreasonable. Fairment Foods Co. v. City of Duluth, 260 Minn. 323, 110 N.W.2d 155 (1961).

This Court has reviewed the analysis and four-part test described and set forth in Central Hudson Corp. v. Public Service Commission of New York, supra. The evidence is not yet sufficient to complete that analysis in the instant case, and the only parts of the test that can now be addressed are those confirming the State's substantial governmental interests in regulating the subject matter of the ADAD statutes and their direct advancement of those interests. Neither of those can now be denied as a matter of law,

and neither can the commercial speech here be deemed as a matter of law to be unprotected nor can the ADAD statutes now be said to be more extensive than necessary.

The means of regulation herein are not required to be the least restrictive by which the regulation can be accomplished, but they are required to be reasonable. See, Board of Trustees of the State University of New York v. Fox, 109 S.Ct. 3028 (1989). It cannot now be said that the ADAD statutes are, as a matter of law, not reasonable.

Based upon the presumption of constitutionality of the statutes in question, the heavy burden of proof upon the defendants to prove them invalid and the likelihood of the State's success at trial, the defendants' request for a temporary injunction must be denied. The State is entitled to a statutory injunction prohibiting the violation of the ADAD statutes as more completely set forth in the Order herein, and it is not required to post a bond or other security in connection therewith.

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

Case Type: Other Civil
Consumer Protection

State of Minnesota by
Its Attorney General,
Hubert H. Humphrey, III,

Plaintiff,

vs.

Court File No. _____

Casino Marketing Group, Inc., and Larry J. Hall, a/k/a "Bud Hall," d/b/a "721 Associates," and d/b/a "Associated Marketing,"

Defendants.

SUMMONS

THE STATE OF MINNESOTA TO THE ABOVE-NAMED DEFENDANTS:

You are hereby summoned and required to serve upon plaintiff's attorneys an Answer to the Complaint which is herewith served upon you within twenty (20) days after the service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

Dated: October 29, 1990.

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota

By: _____
JAMES P. JACOBSON
Special Assistant
Attorney General
Atty. Lic. #18827X

Second Floor, Ford Building
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Attorney for Plaintiff

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

Case Type: Other Civil
Consumer Protection

State of Minnesota by
Its Attorney General,
Hubert H. Humphrey, III,

Plaintiff, Court File No. _____

vs.

Casino Marketing Group, Inc., and Larry J. Hall, a/k/a "Bud Hall," d/b/a "721 Associates," and d/b/a "Associated Marketing,"

COMPLAINT

Defendants.

The State of Minnesota, by its Attorney General, Hubert H. Humphrey, III, for its complaint alleges as follows:

INTRODUCTION

1. This is a consumer protection action seeking declaratory and injunctive relief, civil penalties, costs and reasonable attorney's fees. Plaintiff brings this civil lawsuit for violations of Minn. Stat. §§ 32513.26-.31 (1988), regu-

lating the use of automatic dialing-announcing devices used to place commercial telephone solicitations to Minnesota residents.

PARTIES

2. Hubert H. Humphrey, III, is the Attorney General of Minnesota, and brings this action under Minn. Stat. §§ 8.01, 8.31 and 325E.31 (1988).

3. Casino Marketing Group, Inc., ("Casino Marketing") is a Nevada corporation with its principal place of business at 2300 Paseo Del Prado A-20, Las Vegas, Nevada 89102.

4. Larry J. Hall, also known as "Bud Hall," is a Minnesota resident who resides at 884 Mound Street, St. Paul, Minnesota. Hall does business under the names "721 Associates" and "Associated Marketing."

BUSINESS PRACTICES

5. Defendants Casino Marketing and Hall have solicited the sale of travel services in Minnesota by making commercial telephone solicitations, as defined in Minn. Stat. § 325E.26, subd. 4 (1988), to Minnesota consumers. These commercial telephone solicitations have been placed or arranged by defendant Hall, Casino Marketing's agent in Minnesota.

6. Defendants' commercial telephone solicitations to Minnesota consumers have been placed by an automatic dialing-announcing device, as defined in Minn. Sat. § 325E.26, subd. 2 (1988). The defendants' automatic

dialing-announcing device delivers a prerecorded or synthesized voice message to the number called.

7. The defendants' prerecorded message implies that the consumer receiving the call is the winner of a Las Vegas vacation. To claim this "prize," the consumer is instructed to call 1-800-765-3300 within ten minutes. When the consumer calls this number, defendant Casino Marketing attempts to sell the consumer a Las Vegas travel package.

8. Defendants have used an automatic dialing-announcing device to place their prerecorded messages to Minnesota consumers who have not knowingly or voluntarily requested, consented to, permitted or authorized receipt of such messages. Defendants have also used an automatic dialing-announcing device to place their prerecorded messages without the use of a live operator who obtains the consumer's consent before the message is delivered.

9. In placing commercial telephone solicitations to Minnesota consumers through the use of an automatic dialing-announcing device, defendants have failed to make the disclosures required by Minn. Stat. § 325E.29 (1988). Specifically, defendants have failed to disclose through a live operator at the outset of defendants' solicitations (1) the name of the business, firm, organization, association, partnership or entity for which the message is being made; (2) the purpose of the message; (3) the identity or kinds of goods or services the message is promoting; and (4) the fact that the message intends to solicit payment or commitment of funds.

COUNT I

10. Plaintiff realleges paragraphs 1 to 9.

11. As described above, defendants have used an automatic dialing-announcing device without obtaining the consumer's knowing or voluntary consent, and without preceding the message by live operator who obtains the consumer's consent. This conduct violates Minn. Stat. § 325E.27 (1988).

COUNT II

12. Plaintiff realleges paragraphs 1 to 11.

13. As described above, defendants have used an automatic dialing-announcing device without disclosing, through a live operator, the name of the business for which the message is made, the purpose of the message, the identity or kinds of goods or services the message is promoting and the fact that the message intends to solicit payment or commitment of funds. This conduct violates Minn. Stat. § 325E.29 (1988).

COUNT III

14. Plaintiff realleges paragraphs 1 to 13.

15. As described above, defendants have used an automatic dialing-announcing device to make commercial telephone solicitations to consumers before 9:00 a.m. This conduct violates Minn. Stat. § 325E.30 (1988).

RELIEF

WHEREFORE, plaintiff asks that the Court enter its order and judgment:

I. Declaring and adjudging the conduct alleged in this complaint in violation of Minn. Stat. §§ 325E.26-.31 (1988).

II. Enjoining the defendants and their employees, agents, successors and assigns from engaging in the practices alleged in this complaint and from using any automatic dialing-announcing devices in the state of Minnesota, or to originate calls within Minnesota, in violation of Minn. Stat. §§325E.26-.31 (1988).

III. Awarding judgment in favor of the state of Minnesota and against the defendants, jointly and severally in the amount of $25,000 per violation of law, as civil penalties pursuant to Minn. Stat. § 8.31 (1988).

IV. Awarding plaintiff reasonable attorney's fees and costs of investigation as authorized by Minn. Stat. § 8.31 (1988).

V. Granting such other legal or equitable relief as this Court deems just and proper.

Dated: October 29, 1990.

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota

By: _____

JAMES P. JACOBSON
Special Assistant
Attorney General
Atty. Lic. #18827X

Second Floor, Ford Building
117 University Avenue
St. Paul, MN 55155
(612) 296-1006

Attorney for Plaintiff

MINN. STAT § 549.21
ACKNOWLEDGEMENT

The party or parties on whose behalf the attached pleading is served acknowledge through their undersigned counsel that costs, disbursements, and reasonable attorney and witness fees may be awarded to the opposite party or parties pursuant to Minn. Stat. § 549.21, subd. 2 (1988).

Dated: October 29, 1990.

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota

By: _____

JAMES P. JACOBSON
Special Assistant
Attorney General
Atty. Lic. # 18827X

Second Floor, Ford Building
117 University Avenue
St. Paul, MN 55155
(612) 296-1006

Attorneys for Plaintiff

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

Case Type: Other Civil
Consumer Protection

State of Minnesota by
Its Attorney General,
Hubert H. Humphrey, III,

Plaintiff,

vs.

Court File No. _____

Universal American
Credit Card, Inc.,
and Larry J. Hall,
a/k/a "Bud Hall," d/b/a
"721 Associates,"
and d/b/a
"Associated Marketing,"

Defendants.

SUMMONS

THE STATE OF MINNESOTA TO THE ABOVE-NAMED DEFENDANTS:

You are hereby summoned and required to serve upon plaintiff's attorneys an Answer to the Complaint which is herewith served upon you within twenty (20) days after the service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

Dated: October 29, 1990.

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota

By: _____

JAMES P. JACOBSON
Special Assistant
Attorney General
Atty. Lic. #18827X

Second Floor, Ford Building
117 University Avenue
St. Paul, MN 55155
(612) 296-1006

Attorney for Plaintiff

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

Case Type: Other Civil
Consumer Protection

State of Minnesota by
Its Attorney General,
Hubert H. Humphrey, III,

Plaintiff, Court File No. _____

vs.

Universal American
Credit Card, Inc.,
and Larry J. Hall,
a/k/a "Bud Hall," d/b/a
"721 Associates,"
and d/b/a
"Associated Marketing,"

Defendants.

COMPLAINT

The State of Minnesota, by its Attorney General, Hubert H. Humphrey, III, for its complaint alleges as follows:

INTRODUCTION

1. This is a consumer protection action seeking declaratory and injunctive relief, civil penalties, costs and reasonable attorney's fees. Plaintiff brings this civil lawsuit for violations of Minn. Stat. §§ 325E.26-.31 (1988), regulating the use of automatic dialing-announcing devices used to place commercial telephone solicitations to Minnesota residents, and for violations of the Minnesota Deceptive Trade Practices Act, Minn. Stat. §§ 325D.43-48 (1988), the False Statement in Advertising Statute, Minn. Stat. § 325F.67, and the Consumer Fraud Act, Minn. Stat. §§ 325F.68-70 (1988).

PARTIES

2. Hubert H. Humphrey, III, is the Attorney General of Minnesota, and brings this action under Minn. Stat. §§ 8.01, 8.31 and 325E.31 (1988).

3. Universal American Credit Card, Inc., ("UACC") is a Texas corporation with its principal place of business at 807 Forest Ridge Road, Suite 103, Bedford, Texas 76022.

4. Larry Hall, also known as "Bud Hall," is a Minnesota resident who resides at 884 Mound Street, St. Paul, Minnesota. Hall does business under the names "721 Associates" and "Associated Marketing."

BUSINESS PRACTICES

PRERECORDED SOLICITATIONS

5. Defendants UACC and Hall have solicited the sale of credit cards in Minnesota by making commercial telephone solicitations, as defined in Minn. Stat. § 325E.26,

subd. 4 (1988), to Minnesota consumers. These commercial telephone solicitations have been placed or arranged by defendant Hall, UACC's agent in Minnesota.

6. Defendants' commercial telephone solicitations to Minnesota consumers have been placed by an automatic dialing-announcing device, as defined in Minn. Stat. § 325E.26, subd. 2 (1988). The defendants' automatic dialing-announcing device delivers a prerecorded or synthesized voice message to the number called.

7. Defendants' commercial telephone solicitations to Minnesota consumers promote a credit card offering credit for those with poor credit histories, prior bankruptcies or no credit history at all. The call instructs the recipient to telephone (612) 220-2654 for further information about the credit card.

8. Defendants have used an automatic dialing-announcing device to place their prerecorded solicitations to Minnesota consumers that have not knowingly or voluntarily requested, consented to, permitted or authorized receipt of such messages. Defendants have also used an automatic dialing-announcing device to place their prerecorded messages without the use of a live operator who obtains the consumer's consent before the message is delivered.

9. In placing commercial telephone solicitations to Minnesota consumers through the use of an automatic dialing-announcing device, defendants have failed to make the disclosures required by Minn. Stat. § 325E.29 (1988). Specifically, defendants have failed to disclose through a live operator at the outset of defendants' solicitations:

a. The name of the business firm, organization, association, partnership or entity for which the message is being made;

b. The purpose of the message;

c. The identity or kinds of goods or services the message is promoting; and

d. The fact that the message intends to solicit payment or commitment of funds.

DECEPTIVE PRACTICES AND MISREPRESENTATIONS

10. Upon calling the number listed in the defendants' prerecorded message, the caller hears another recorded telephone message for defendants' credit card. The message offers a $1500 line of credit promising that the caller has been preapproved and that almost everyone qualifies for the credit card. The caller is instructed to leave his or her name and telephone number.

11. After leaving a name and telephone number, the consumer receives another call promoting defendants' credit card. The consumer is told that the credit card offers a $1500 line of credit regardless of past credit history, and that the consumer will be able to purchase merchandise through UACC's catalogues. The solicitation for the UACC credit card also contains numerous statements that are false, deceptive or misleading. These false, deceptive or misleading statements include the following:

A. The UACC solicitation states that UACC will report good payment on a UACC account to credit bureaus, thereby enhancing the consumer's credit rating. In fact, almost all credit card companies provide credit bureaus with monthly payment updates on all customers. The service provided by UACC is therefore no different than that provided by any other credit card company, despite the misleading implication of UACC's telephone pitch that UACC helps consumers build up their credit card credit rating in a way that other credit card companies do not.

B. The UACC solicitation states that "like all major credit cards, there is a $30 card issuance and catalogue fee." In fact, many credit cards, especially credit cards such as the UACC credit card that permit purchases from only the issuing retailer, have no annual fee or a fee of less than $30.

C. The UACC solicitation states that this offer "is good right now only." In fact, UACC has been offering substantially the same credit card offer since October 1988.

D. The UACC solicitation states that "for a short time only" it is running a "special promotion" offering a $100

gift certificate if the consumer gives three referrals. In fact, UACC has been offering the $100 gift certificate since at least October 1988.

E. The UACC solicitation states that the UACC offer is being made "to a limited number of people." In fact, the offer appears to have been made at random to persons throughout the Twin Cities area.

F. The UACC solicitation states that "there is no qualifying as long as you are 18 years or over." However, the consumer is required to have at least $150 a week of income and not be subject to pending bankruptcy proceedings in order to be eligible for the UACC account.

G. The UACC solicitation states that the $30 card issuance and catalogue fee is paid "after you receive your credit card," implying that there is a benefit in receiving the UACC credit card before having to pay for it. Although it is true that the fee is paid after the consumer receives the credit card, the credit card is not "activated" until receipt of the $30 fee. The credit card is therefore useless until the consumer has paid the $30 fee and there is therefore no benefit in

receiving the UACC credit card before paying the $30 fee.

H. The UACC solicitation states that the "enrollment cost" is "just $49.95." The script states later on, however, that there will be a charge for two $25 calls, for a total of $50.

I. The UACC solicitation states that the consumer must dial two 900 numbers "for your protection and security and to stop children from calling." In fact, UACC likely structures the transaction with the two $25 calls in order to avoid the limit of $25 per 900 number call imposed by MCI, the exchange company that provides the 900 service for UACC.

J. The UACC solicitation states that "as a bonus we are also going to give you a new long distance service that will save you a lot of money. It's 10 to 17% less than AT&T and guaranteed to be at least 5% less than Sprint and other major carriers." The consumer is not told, however, that the local exchange carrier charges a $5 fee for switching a consumer's long distance service. Unless the consumer objects to receiving this new long distance service, or refuses to provide the billing address for his or her current long distance service, the consumer

will be automatically switched to this "new long distance service" by UACC and will be charged the $5 switching fee, without expressly consenting to discontinue the consumer's previous service or to pay the $5 switching fee.

K. The UACC solicitation states that after the consumer charges $500 on a UACC card and has paid for it on a timely basis over six months, UACC will "sponsor" the consumer "for your own Visa or Master Card with no security deposit required . . . by you." UACC is aware that many consumers have difficulty obtaining a VISA or Master Card, credit cards that may be used to purchase goods and services at many locations throughout the United States. In view of past credit problems and problems obtaining credit, consumers will pursue opportunities that will enable them to qualify for a Visa or Master Card. Rather than informing consumers in the initial presentation what the term "sponsored" for a Visa or Master Card means, UACC requires consumers to first dial two 900 numbers, resulting in $50 in charges, to find out the details of its Visa or Master Card program. Only after incurring $50 in charges does a consumer learn that the term "sponsored" for a Visa or Master

Card means that UACC will make a $300 security deposit for the consumer to enable the consumer to get a Visa or Master Card wilth a $300 credit limit.

COUNT I

12. Plaintiff realleges paragraphs 1 to 11.

13. As described in paragriaph 8, defendants UACC and Hall have used an automatic dialing-announcing device to solicit the sale of credit cards without obtaining the consumer's knowing or voluntary consent, and without preceding the message by a live operator who obtains the consumer's consent. This conduct violates Minn. Stat. §§ 325E.27 (1988).

COUNT II

14. Plaintiff realleges paragraphs 1 to 13.

15. As described in paragraph 9, defendants UACC and Hall have used an automatic dialing-announcing device without disclosing, through a live operator, the name of the business for which the message is made, the purpose of the message, the identity or kinds of goods or services the message is promoting and the fact that the message intends to solicit payment or commitment of funds. This conduct violates Minn. Stat. § 325E.29 (1988).

COUNT III

16. Plaintiff realleges paragraphs 1 to 15.

17. As described in paragraph 11, defendants' solicitation for the UACC credit card contains numerous

statements that are false, deceptive or misleading regarding the costs, benefits and terms of a UACC credit card. This conduct violates Minn. Stat. § 325D.44, subd. 2 (1988), Minn. Stat. § 325F.67 (1988) and Minn. Stat. § 325F.69, subd. 2 (1988).

RELIEF

WHEREFORE, plaintiff asks that the Court enter its order and judgment:

I. Declaring and adjudging the conduct alleged in this complaint in violation of Minn. Stat. §§ 325E.26-.31, 325D.44, 325F.67 and 325F.69 (1988).

II. Enjoining the defendants and their employees, agents, successors and assigns from engaging in the practices alleged in this complaint and from using any automatic dialing-announcing devices in the state of Minnesota, or making calls into Minnesota, in violation of Minn. Stat. §§ 325E.26-.31 (1988).

III. Awarding judgment in favor of the state of Minnesota and against the defendants, jointly and severally, in the amount of $25,000 per violation of law, as civil penalties pursuant to Minn. Stat. § 8.31.

IV. Awarding plaintiff reasonable attorney's fees and costs of investigation as authorized by Minn. Stat. § 8.31 (1988).

V. Granting such other legal or equitable relief as this Court deems just and proper.

Dated: October 29, 1990.

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota

By:_____
JAMES P. JACOBSON
Special Assistant
Attorney General
Atty. Lic. #18827X

Second Floor, Ford Building
117 University Avenue
St. Paul, MN 55155
(612) 296-1006

Attorneys for Plaintiff

MINN. STAT. § 549.21
ACKNOWLEDGEMENT

The party or parties on whose behalf the attached pleading is served acknowledge through their undersigned counsel that costs, disbursements, and reasonable attorney and witness fees may be awarded to the opposite party or parties pursuant to Minn. Stat. § 549.21, subd. 2 (1988).

Dated: October 29, 1990.

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota

By:_____
JAMES P. JACOBSON
Special Assistant
Attorney General
Atty. Lic. #18827X

Second Floor, Ford Building
117 University Avenue
St. Paul, MN 55155
(612) 296-1006

Attorneys for Plaintiff

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

Case Type: Other Civil
Consumer Protection

State of Minnesota by
Its Attorney General,
Hubert H. Humphrey, III,

Plaintiff, Court File No. _____

vs.

Casino Marketing Group, Inc., and Larry J. Hall, a/k/a "Bud Hall," d/b/a "721 Associates," and d/b/a "Associated Marketing,"

NOTICE OF MOTION AND MOTION FOR TEMPORARY INJUNCTION

Defendants.

Please take notice that on December 3, 1990, at 3:00 p.m., the State of Minnesota will apply to the Ramsey County District Court, The Honorable Otis H. Godfrey, Room 1309, 15 West Kellogg Boulevard, St. Paul, Minnesota 55102, for a temporary injunction pursuant to Minn. Stat. § 8.31, subd. 3 and § 325E.31 (1988), and Minn. R. Civ. P. 65.02. The plaintiff will move the Court to temporarily enjoin, pending final judgment in this action, the above-entitled defendants, their employees, agents,

successors and assigns and all persons action in concert or participation with them directly or indirectly from:

1. Using an automatic dialing-annoucing device to contact Minnesota consumers, or to originate calls within Minnesota, in violation of Minn. Stat. §§ 325E.26-.31 (1988).

2. Using an automatic dialing-announcing device for commercial telephone solicitations without obtaining the consumer's knowing or voluntary consent or without preceding the message by live operator who obtains the consumer's consent.

3. Using an automatic dialing-announcing device for commerical telephone solicitations without disclosing through a live operator the name of the business for which the message is made, the purpose of the message, the identity or kinds of goods or services the message is promoting and the fact that the message intends to solicit payment or commitment of funds.

Dated: October 29, 1990.

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota

By: _____
JAMES P. JACOBSON
Special Assistant
Attorney General
Atty. Lic. #18827X

Second Floor, Ford Building
117 University Avenue
St. Paul, MN 55155
(612) 296-1006

Attorney for Plaintiff

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

Case Type: Other Civil
Consumer Protection

State of Minnesota by
Its Attorney General,
Hubert H. Humphrey, III,

Plaintiff,

vs.

Universal American
Credit Card, Inc.,
and Larry J. Hall,
a/k/a "Bud Hall," d/b/a
"721 Associates," and
d/b/a "Associated
Marketing,"

Defendants.

Court File No. _____

NOTICE OF MOTION AND MOTION FOR TEMPORARY INJUNCTION

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judgment in this action, the above-entitled defendants, their employees, agents, successors and assigns and all persons acting in concert or participation with them directly or indirectly from:

1. Using an automatic dialing-announcing device to contact Minnesota consumers, or to originate calls within Minnesota, in violation of Minn. Stat. §§ 325E.26-.31 (1988).

2. Using an automatic dialing-announcing device for commercial telephone solicitations without obtaining the consumer's knowing or voluntary consent or without preceding the message by live operator who obtains the consumer's consent.

3. Using an automatic dialing-announcing device for commercial telephone solicitations without disclosing through a live operator the name of the business for which the message is made, the purpose of the message, the identity or kinds of goods or services the message is promoting and the fact that the message intends to solicit payment or commitment of funds.

Dated: October 29, 1990.

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota

By: _____
JAMES P. JACOBSON
Special Assistant
Attorney General
Atty. Loc. #18827X

Second Floor, Ford Building
117 University Avenue
St. Paul, MN 55155
(612) 296-1006

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

Case Type: Other Civil
Consumer Protection

State of Minnesota by
Its Attorney General,
Hubert H. Humphrey, III,

Plaintiff,

vs. **AFFIDAVIT OF LARRY J. HALL**

Casino Marketing Group, Inc.,
and Larry J. Hall,
a/k/a "Bud Hall," d/b/a
"721 Associates,"
and d/b/a
"Associated Marketing,"

Court File No. C6-90-12442

Defendants.

STATE OF MINNESOTA)
) SS.
COUNTY OF HENNEPIN)

Larry J. Hall, being first duly sworn on oath, hereby deposes and says the following:

1. Your affiant is one of the Defendants in the above-entitled action.

2. For the past two years your affiant's sole source of income has been work as an independently contracting advertiser, making use of automatic dialing-announcing devices.

3. As such, your affiant contracts with various private companies to do telephone presentations, through the use of automatic dialing-announcing devices, wherein the customer will be presented with the product or service to be provided, and a telephone number will be left for any interested customer to call. Your affiant's income is based upon the sales made by the contracting company, your affiant receiving anywhere from $5.00 to $50.00 from any given sale.

4. The automatic dialing-announcing devices select numbers by computer program, dialing every tenth number from a pre-selected list of numbers.

5. The device is programmed to respond as follows:

a. If the response to the automatically dialed call is a busy signal, the machine will automatically disconnect, move on to the next call, and call back at some later point in time.

b. If no one responds to the call after the first four rings, the device will disconnect, move onto the next call, and call back at a later point in time.

c. If there is a response, the message is played to the recipient. In the event that the recipient hangs up the phone prior to completion of the message, the device will automatically disconnect and move on to the next call. No further attempt will be made to solicit any caller who hangs up the phone prior to completion of the message.

d. If the recipient listens to the entire message, he or she will be given a telephone number to call, in the event that he or she wishes to respond favorably to the solicitation.

6. Your affiant's experience in two years of solicitation has been that your affiant will get approximately 25 positive responses per day per soliciting machine.

7. Your affiant's automatic dialing-announcing devices can easily be programmed to exclude the numbers of any person or institution which does not wish to receive an unsolicited call.

8. Persons in the business of solicitation through automatic dialing-announcing devices have repeatedly requested the help of the telephone company in assuring that unwanted calls are not made, by requesting telephone company assistance in providing them with telephone numbers of hospital rooms, business centrex numbers, and the like, so that such numbers could be automatically excluded from the dialing program. The telephone company has consistently refused to cooperate in such efforts.

9. Your affiant is aware that in the above-entitled action complaint has been made that unsolicited calls were made to hospital rooms at Abbott-Northwestern Hospital in Minneapolis.

10. Said calls were made for only one day, during which day your affiant was away from the phones and not supervising what had taken place.

11. As soon as it was discovered that the machines were making calls to hospital rooms, the Abbott-Northwestern Hospital numbers were red flagged, and excluded from

the dialing program. After the first day, no further calls were made to any Abbott-Northwestern Hospital phones.

12. Enforcement of the provisions of Minnesota Statutes Section 325E.26-325E.31 obviously will mean a total inability for your affiant to do business through use of automatic dialing-announcing devices, because, if such calls must be preceded by a live operator announcing the purpose for which the calls will be made, no advantage will arise from the use of a device to make such calls, since the live operator might as well perform the solicitation.

13. Obviously the result will be the total loss of your affiant's sole source of income, as well as your affiant's inability to exercise rights guaranteed to him by the First and Fourteenth Amendments to the United States Constitution, and Article 1, Section 3 of the Minnesota Constitution.

14. Your affiant executes this affidavit in support of the attached motion for temporary injunction enjoining Plaintiff from enforcing the provisions of Minnesota Statutes Sections 325E.26325E.31 during the pendency of this litigation.

_____

Larry J. Hall

Sworn to and subscribed to before
me this 6th day of November, 1990.

Randall D.B. Tigue
Notary Public, Ramsey County, Minnesota
My commission expires 01-29-96

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

Case Type: Other Civil
Consumer Protection

State of Minnesota by
Its Attorney General,
Hubert H. Humphrey, III,

Plaintiff,

vs.

Universal American
Credit Card, Inc.,
and Larry J. Hall,
a/k/a "Bud Hall," d/b/a
"721 Associates,"
and d/b/a
"Associated Marketing,"

Defendants.

SUPPLEMENTAL AFFIDAVIT OF LARRY J. HALL

Court File No. C6-90-12443

STATE OF MINNESOTA)
) SS.
COUNTY OF HENNEPIN)

Larry J. Hall, being first duly sworn on oath, hereby deposes and says the following:

1. Your affiant is one of the Defendants in the above-entitled action.

2. Your affiant has read the supplemental affidavit of Lisa J. Sieben, submitted in connection with Plaintiff's brief in opposition to Defendant Hall's motion for temporary injunction in the above-entitled matter.

3. Said affidavit, while technically correct, is highly misleading in several aspects.

4. In Paragraph 3 of the affidavit, Ms. Sieben asserts that during November and December of 1990, at least 166 Minnesota residents telephoned the Attorney General's office to complain about receiving calls from automatic dialing-answering devices.

5. To put the statement in context, however, it should be realized that your affiant alone placed between 28-32,000 calls per day from such machines during both November and December of 1990.

6. This does not take into account any other operators within the State of Minnesota using such devices.

7. This clearly means that well over one million phone numbers were contacted through the use of such devices during the period of time in question.

8. The fact that out of these one million households, only 166 complaints were received plainly indicates that the overwhelming majority of households are not offended by the receipt of such calls.

9. As your affiant indicated in his previous affidavit, your affiant's own machines result in approximately 25 positive responses per day per machine.

10. This plainly indicates that the number of positive responses to the solicitations far outnumber the complaints.

11. Plaintiff's proposed temporary injunction would have

the effect of denying access to communications to thousands of persons not offended, many of whom respond positively, in order to satisfy the concerns of the 166 persons who are offended by receiving the calls.

12. Also included in Ms. Sieben's affidavit is a letter from an individual consumer demanding that his name be removed from the list of persons to be solicited by automatic dialing-announcing devices.

13. This particular consumer, as well as all 166 persons who complained to the Attorney General's office, could be so removed were your affiant and other automatic dialing device operators aware of their existence.

14. All of your affiant's machines can readily be programmed not to dial any number your affiant tells said machines not to dial.

15. Were your affiant required to do so, and were your affiant to be supplied with a list of name of persons who did not wish to be solicited, your affiant could readily comply with such a regulation.

16. Paragraph 3 of Ms. Sieben's affidavit also states the following:

> "Many (of the complaining consumers) are concerned that they do not have the ability to use their telephone in the event of an emergency when an automatically dialed message is playing and tying up their telephone line."

17. All of your affiant's machines, as well as all recently manufactured automatic dialing devices, disconnect instantly as soon as the telephone is hung up by the recipient of a call.

18. Any delay in the use of the telephone following its being hung up is due, not to anything inherent in an automatic

dialing device, but rather with the telephone company's pause in disconnecting the phone, as a matter of preventing accidental disconnection. This pause exists, whether the call is placed by an automatic dialing-answering device, or by a live operator.

19. Also highly misleading is the assertion in Plaintiff's responsive brief that the requirement of a live operator to introduce an automatic dialing-announcing device is a less restrictive alternative that an outright ban on the use of such devices.

20. In practical terms, the requirement of a live operator to introduce an automatic dialing-announcing device is absolutely no different than an outright ban.

21. The sole reason for use of automatic dialing devices is that it dispenses with the need for a live operator to make the telephone calls. If your affiant were required to use a live operator to introduce the telephone calls, there would be no need for such a device, since the operator could make the sales pitch live.

22. Because the requirement of a live operator removes the only advantage existing for use of such devices, the requirement is, for all practical purposes, an absolute ban on the use of such devices.

23. Your affiant also operates an organization entitled the Incumbent Removal Service. Said organization is a political action committee, registered with the Federal Elections Commission. The purpose of said organization is to oppose politicians, like Plaintiff Humphrey, who seek the enactment and enforcement of regulations which infringe upon the constitutional rights of citizens.

24. Said organization does not solicit the sale of goods and services, within the meaning of Minnesota Statutes Section 325E.26, Subd. 4, and thus is plainly outside the scope of

Minnesota Statutes Sections 325E.26-325E.31.

25. Despite this obvious fact, Plaintiff has sought to prevent your affiant from using automatic dialing-announcing devices to place calls on behalf of the Incumbent Removal Service, action plainly not justified under the statute and action plainly violative of your affiant's rights under the First and Fourteenth Amendments to the United States Constitution.

Further your affiant sayeth not.

_____

Larry J. Hall

Sworn to and subscribed to before
me this 18th day of January, 1991.

Marilee Kaeder
Notary Public, Ramsey County, Minnesota
My commission expires 01-29-96

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

KATHRYN MOSER AND
NATIONAL ASSOCIATION
OF TELECOMPUTER OPERATORS,

PLAINTIFFS,

VERSUS

FEDERAL COMMUNICATIONS
COMMISSION, A FEDERAL
AGENCY, AND ALFRED C.
SIKES, IN HIS CAPACITY AS
CHAIRMAN OF THE FEDERAL
COMMUNICATIONS COMMISSION,

DEFENDANTS.

CV. NO. 92-1408-AS
DECEMBER 17, 1992

PORTLAND, OREGON

HEARING ON PRELIMINARY INJUNCTION

BEFORE: THE HONORABLE JAMES A. REDDEN,
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES OF COUNSEL

FOR THE PLAINTIFF: CHARLES HINKLE
JULIANNE DAVIS

FOR THE DEFENDANTS: HERBERT SUNDBY
JANE MAGO

REPORTED BY: LIZ MEACHAM
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(503) 326-3113

KATHRYN RUTH MOSER

CALLED AS A WITNESS IN BEHALF OF THE PLAINTIFF, FIRST HAVING BEEN DULY SWORN ON OATH, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

THE CLERK: HAVE A SEAT. PLEASE STATE YOUR FULL NAME FOR THE RECORD, SPELLING YOUR LAST NAME.

THE WITNESS: KATHRYN RUTH MOSER, M-0-S-E-R.

DIRECT EXAMINATION

BY MR. HINKLE:

Q. ARE YOU MARRIED, MRS. MOSER?

A. YES.

Q. IS THIS YOUR HUSBAND SITTING IN THE COURTROOM?

A. YES.

Q. WHAT IS HIS NAME?

A. RONALD MOSER.

Q. WHAT IS YOUR OCCUPATION?

A. WE OWN A CHIMNEY SWEEPING AND LAWN AERATING BUSINESS.

Q. HOW LONG HAVE YOU BEEN IN THAT BUSINESS?

A. ABOUT SIX YEARS.

Q. DID YOU START THAT BUSINESS IN OREGON?

A. NO. WE ORIGINALLY STARTED IN SALT LAKE CITY, UTAH, IN 1987.

Q. WHAT WAS YOUR WORK BEFORE THAT?

A. I WORKED AS A TECHNICAL ASSISTANT FOR U. S. WEST.

Q. AND WHY DID YOU LEAVE THAT WORK?

A. TECHNOLOGICAL DISPLACEMENT. I COULD EITHER RETIRE WITH AN EARLY RETIREMENT OR BE LAID OFF. SO I CHOSE TO BE LAID OFF -- SO I CHOSE TO -- EARLY RETIREMENT.

Q. WHERE DID THE CAPITAL COME TO START YOUR CHIMNEY SWEEP BUSINESS?

A. MY EARLY RETIREMENT FUNDS.

Q. WHEN DID YOU COME TO OREGON?

A. IN AUGUST OF 1989.

THE COURT: LET ME INTERRUPT JUST FOR A MOMENT.

MISS MAGO, ARE YOU ABLE TO HEAR?

MS. MAGO: YES, SIR, I AM.

THE COURT: GO AHEAD.

MS. MAGO: THE LINE DOES KEEP COMING IN AND OUT, BUT I'M ABLE TO PUT MOST OF THIS TOGETHER.

MR. HINKLE: I'LL MOVE THE MIC A LITTLE CLOSER HERE TO ME.

BY MR. HINKLE:

Q. WHAT IS THE NAME OF YOUR BUSINESS?

A: TRIPLE A-1 LUCKY LEPRECHAUN.

Q: AND WHERE ARE YOU LOCATED?

A. OUT OF SALEM, OREGON.

Q. IN UTAH WHEN YOU STARTED THIS CHIMNEY SWEEP BUSINESS, HOW DID YOU ADVERTISE?

A. WE STARTED WITH NEWSPAPER ADVERTISING AND DOOR-TO-DOOR FLIERS.

Q. WAS THAT COST EFFECTIVE?

A. NO, IT WASN'T. WE WERE -- IN THE BUSIEST TIME OF THE YEAR, THROUGH -- AUGUST THROUGH DECEMBER, WE WERE ACTUALLY STARVING.

Q. YOU WERE -- YOUR FINANCIAL SITUATION OF YOUR BUSINESS WAS GRIM?

A: IT WAS DETERIORATING QUICKLY.

Q. WHAT IS YOUR ROLE IN THE BUSINESS AS OPPOSED TO YOUR HUSBAND'S ROLE?

A. I MANAGE THE BUSINESS. I -- I'M LOSING MY MIND. LET ME PULL OUT MY NOTES.

I MAKE BUSINESS DECISIONS, FINANCIAL DECISIONS, I DESIGN ALL THE FLIERS AND ADS. I

PLACE THE ADS. I DISTRIBUTE FLIERS DOOR TO DOOR. I SET APPOINTMENTS. I TAKE PHONE CALLS. I FOLLOW UP THE TELECOMPUTER-GENERATED LEADS. I PAY THE BILLS. I WRITE WORK ORDERS. AND, WHEN NEEDED, I ASSIST MY HUSBAND ON THE JOB SITE.

Q. AND YOUR HUSBAND ACTUALLY GOES OUT AND DOES THE CHIMNEY CLEANING, I TAKE IT?

A. YES, HE DOES THE DIRTY WORK.

Q. ARE YOU A MEMBER OF THE BETTER BUSINESS BUREAU?

A. YES.

Q. ARE YOU BONDED BY THE STATE OF OREGON?

A. YES. WE BELONG TO THE STATE CONTRACTORS' BOARD.

Q. AFTER YOU FOUND THAT THESE OTHER MEANS OF ADVERTISING WERE NOT EFFECTIVE IN UTAH, WHAT DID YOU DO?

A. WE SAW AN AD FOR A TELECOMPUTER THAT WOULD GENERATE LEADS FOR US, SO WE TOOK THE LAST BIT OF CAPITAL WE HAD ON A RENT-TO-OWN BASIS TO SEE IF IT WOULD GENERATE THE LEADS THAT IT SAID THAT IT DID. AND SO WE RENTED A TELECOMPUTER FOR -- WITH THE IDEA OF ONE MONTH TO SEE WHETHER IT WORKED OR NOT. THE FIRST WEEK IT MADE ITS RENTAL PAYMENT.

Q. HOW DID THAT COMPUTER WORK?

A. IT WORKED GREAT.

Q. I MEAN, DID YOU PUT -- DID YOU HAVE A MESSAGE ON IT IN YOUR VOICE?

A. WE HIRED A PROFESSIONAL TO PUT ON A MESSAGE. IT TOOK 15 SECONDS. IT JUST GENERALLY CALLED AND SAID, "WE'RE CLEANING CHIMNEYS IN YOUR NEIGHBORHOOD. IF YOU'RE INTERESTED, LEAVE YOUR NAME AND NUMBER AND WE WILL GET BACK TO YOU." AND IT TOOK 15 SECONDS FOR THE INITIAL MESSAGE.

Q. WHY DID YOU LEAVE UTAH?

A. MY HEALTH WASN'T TOO GOOD, AND I HAD A PROBLEM WITH THE COLD. AND WE DECIDED UTAH -- I MEAN, OREGON HAD A BETTER CLIMATE.

Q. WHEN YOU MOVED TO SALEM, DID YOU USE OTHER MEANS OF ADVERTISING THERE?

A. YES. WE IMMEDIATELY STARTED IN WITH DOOR-TO-DOOR FLIERS AND THE TELECOMPUTER. WE PREVIOUSLY CALLED THE STATE OF OREGON BEFORE WE MOVED HERE AND FOUND OUT THAT THERE WERE NO TELECOMPUTER RESTRICTIONS AT THE TIME, OR WE'D -- WE WOULD HAVE NEVER LEFT THE STATE OF UTAH. SO WE -- WE CAME IN WITH THE IDEA OF USING THE TELECOMPUTER AND DOOR-TO-DOOR FLIERS.

Q. DID YOU USE FLIERS?

A. YES, WE DID.

Q. WERE THEY EFFECTIVE IN OREGON?

A. NO.

Q. HOW ABOUT THE YELLOW PAGES? DID YOU PUT AN AD IN THERE?

A. WE MOVED IN AUGUST OF '89 AND WERE NOT ABLE TO BE IN THE YELLOW PAGES UNTIL MAY OF '90, BUT WE DID PLACE THE AD AT THAT TIME AND HAVE BEEN IN THE YELLOW PAGES EVER SINCE.

Q. HOW DO YOU KNOW WHERE YOUR CUSTOMERS COME FROM? THAT IS, DO THEY SEE YOU IN THE NEWSPAPER AD OR THE -- BY A FLIER, BY TELECOMPUTER? HOW DO YOU KNOW THE SOURCE OF THE CUSTOMERS?

A. WE TRACK ON OUR WORK ORDERS. WE HAVE A FORM, AND WE MARK WHERE OUR BUSINESS COMES FROM.

MR. HINKLE: COULD THE WITNESS BE HANDED EXHIBIT 3?

(CLERK HANDING)

BY MR. HINKLE:

Q. IS THIS YOUR WORK ORDER, MRS. MOSER?

A. YES, IT IS.

Q. AND CAN YOU SHOW THE COURT WHERE -- WHAT IT IS YOU'RE TALKING ABOUT, WHERE YOU GET THE SOURCE?

A. I DON'T KNOW. WHO AM I SUPPOSED TO SHOW THIS --

MR. HINKLE: SHOW THE JUDGE.

WE OFFER EXHIBIT 3, YOUR HONOR.

THE COURT: IT WILL BE RECEIVED.

BY MR. HINKLE:

Q. SO YOU CAN KEEP TRACK OF WHAT PROPORTION OF YOUR BUSINESS COMES IN THROUGH YOUR TELECOMPUTER?

A. YES, WE DO.

Q: WHAT IS THAT PROPORTION?

A. RIGHT NOW IT'S 70 PERCENT OF OUR BUSINESS.

Q: AND IF YOU COULD NOT USE YOUR TELECOMPUTER, WHAT EFFECT WOULD THAT HAVE ON YOUR BUSINESS?

A. IT WOULD CUT 70 PERCENT OF OUR BUSINESS, AND WE COULDN'T PAY THE YELLOW PAGE ADVERTISING THAT WE HAVE.

Q. YOU WOULD NOT HAVE ENOUGH RECEIPTS FROM YOUR BUSINESS EVEN TO PAY YOUR YELLOW PAGES ADVERTISING?

A. THAT'S CORRECT.

Q. ALL RIGHT. NOW, HOW MANY COMPUTERS DO YOU HAVE RIGHT NOW?

A. WE NOW HAVE TWO.

Q. ALL RIGHT. WHAT -- DO YOU USE BOTH OF THEM ALL THE TIME FOR CUSTOMER SALES PITCHES?

A. NO. SOMETIMES WE HAVE MUCH MORE BUSINESS THAN WE CAN HANDLE, AND DURING THAT

TIME WE USE IT FOR OUR CHURCH TO CALL ON SOCIAL FUNCTIONS AND ACTIVITIES.

Q. ALL RIGHT. WHAT CHURCH DO YOU BELONG TO?

A. THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS.

Q. IS THE USE OF THE COMPUTER EFFECTIVE FOR CHURCH WORK?

A. OH, YES. WHEN WE USE THE COMPUTER, WE GET A LOT MORE PEOPLE OUT TO OUR FUNCTIONS AND VARIOUS MEETINGS. AND WHEN WE DON'T USE IT, PEOPLE GET UPSET AND ASK WHY WE DIDN'T RUN IT.

Q. WHAT MODEL OR BRAND NAME OF TELECOMPUTER DO YOU USE?

A. WE USE THE ETS 1500, THE SENIOR MODEL.

Q. IS THAT MANUFACTURED BY RAY KOLKER'S COMPANY?

A. YES, IT IS.

Q. HOW MANY TELEPHONE NUMBERS CAN IT CALL AT ONE TIME?

A. IT CAN ONLY CALL ONE TELEPHONE NUMBER AT A TIME.

Q. CAN YOU PROGRAM CERTAIN NUMBERS OUT?

A. YES, WE CAN BLOCK INDIVIDUAL NUMBERS OR WHOLE BLOCKS OF NUMBERS.

Q. HOW DOES IT KNOW WHAT NUMBERS TO START CALLING? THAT IS, DO YOU HAVE TO PROGRAM INTO IT A CERTAIN EXCHANGE?

A. YES, I HAVE TO PROGRAM IN THE BEGINNING EXCHANGE NUMBER AND THE ENDING EXCHANGE NUMBER, OR I CAN HAND KEY IN EACH INDIVIDUAL NUMBER. IT JUST DEPENDS ON WHAT I -- WHAT I CHOOSE TO DO.

Q. AND ARE THERE CERTAIN EXCHANGES IN SALEM THAT YOU EXCLUDE ALL TOGETHER?

A: OH, YES. IF THERE'S -- LIKE THE GOVERNMENT EXCHANGE, I DON'T DIAL THAT AND ALSO THE HOSPITAL LINE AND WILLAMETTE UNIVERSITY. I DON'T EVEN DIAL THAT EXCHANGE AT ALL.

Q. IN ADDITION TO THAT, IN THE EXCHANGES THAT YOU DO PROGRAM INTO THE COMPUTER, YOU HAVE SOME INDIVIDUAL NUMBERS BLOCKED OUT?

A. YES, I DO. IF I'M AWARE OF THE EMERGENCY NUMBERS, WHICH I LOOK UP IN EACH EXCHANGE BEFORE I DIAL IT, ANY EMERGENCY NUMBERS THAT ARE PRINTED, THEN I DEFINITELY EXCLUDE THOSE. I DELETE THOSE.

Q. ALL RIGHT. NOW, WHAT HAPPENS WHEN THIS COMPUTER OF YOURS MAKES A PHONE CALL?

A. IT RINGS. IF THE LINE IS BUSY, IT WAITS FOR 15 MINUTES, CALLS THE NUMBER BACK. IS THAT WHAT YOU ARE ASKING ME?

Q. YES.

A. IT DOES THAT THREE DIFFERENT TIMES. ON THE THIRD TIME IF THE NUMBER IS STILL BUSY, IT NO LONGER DIALS IT. IF THERE'S NO ANSWER, IT WAITS – LIKE IF IT DIALS DURING THE DAY, IT WILL WAIT TIL AFTER 5 O'CLOCK AT NIGHT AND TRY ANOTHER TIME. THEN IT NEVER TRIES AGAIN.

ONCE IT HAS DIALED A NUMBER AND SOMEONE HAS ANSWERED IT AND HUNG UP THE TELEPHONE, IT WILL NEVER DIAL IT AGAIN. I CAN PROGRAM IT 20 TIMES THE SAME NUMBER, AND THERE'S A BUILT-IN SAFETY IN THE MACHINE THAT NEVER ALLOWS IT TO DIAL MORE THAN ONCE WHILE THAT EXCHANGE IS IN THERE.

Q. ALL RIGHT. NOW, IF SOMEONE DOES ANSWER THE PHONE, DO YOU HAVE IN THE MACHINE SOMETHING CALLED THE HELLO CHIP?

A. YES. IT TRIES TO DISTINGUISH BETWEEN BUSINESSES AND RESIDENCES. SO IF SOMEONE

ANSWERS SOMETHING OTHER THAN HELLO, LIKE A LONG -- LIKE AN ATTORNEY'S OFFICE, IT WILL HANG UP IMMEDIATELY ON THE CALLED PARTY, SO THAT IT DOESN'T TALK TO BUSINESSES.

Q. IF SOMEONE ANSWERS THE PHONE, "STOEL, RIVES, BOLEY, JONES, AND GREY," YOUR MACHINE WILL HANG UP ON IT?

A. YES, IT DOES.

Q. WHAT HAPPENS IF THE PERSON SAYS HELLO AND YOUR MACHINE STARTS TALKING AND THE PERSON IMMEDIATELY HANGS UP ON IT?

A. OUR MACHINE HAS A CLICK DISCONNECT. JUST AS SOON AS IT DETERMINES THE PHONE IS HUNG UP, IT DISCONNECTS, GETS A DIAL TONE, AND DIALS ANOTHER NUMBER.

Q. ARE THERE CERTAIN TIMES OF DAY THAT YOU DO NOT CALL, THAT THIS MACHINE WILL NOT CALL NUMBERS?

A. WE HAVE OUR -- YES. THERE'S A BUILT-IN SAFETY IN THE MACHINE THAT ONLY ALLOWS IT TO CALL FROM NINE A.M. TO NINE P.M. WE HAVE CHOSEN TO DIAL FROM NINE A.M. TO EIGHT P.M. OURSELVES ON OUR MACHINE.

Q. DO YOU USE IT ON SUNDAYS?

A: NO, WE DON'T -- WELL, EXCEPT FOR CHURCH BUSINESS.

Q. HOW LONG IS YOUR MESSAGE NOW?

A. OUR MESSAGE STILL IS 15 SECONDS.

Q. HOW LONG, THEN, AFTER YOUR 15-SECOND MESSAGE DOES THE MACHINE STAY ON TO RECORD THE CALLER'S RESPONSE?

A. THEY HAVE TO BE TALKING, AND IT STAYS ON ABOUT 15 SECONDS. SO WE TIE UP A LINE ABOUT 30 SECONDS, AND THAT'S IF THE PERSON KEEPS IT GOING THEMSELVES. IF THEY HANG -- ANY TIME THEY HANG UP, IT'S TERMINATED.

Q. AND THE CONNECTION IS RELEASED BY THE COMPUTER?

A. THAT IS CORRECT.

Q. ARE YOU A MEMBER OF THE NATIONAL ASSOCIATION OF TELECOMPUTER OPERATORS?

A. YES, I AM.

Q. THE OTHER PLAINTIFF IN THIS CASE?

A. YES.

Q. ABOUT HOW MANY MEMBERS DO YOU HAVE?

A. WE HAVE ABOUT 40 MEMBERS.

Q. AND ARE THEY USERS OF MACHINES SIMILAR TO YOURS?

A: YES, THEY ARE.

Q. WHO ARE THEY? GIVE US SOME EXAMPLES OF THE KIND OF PEOPLE WHO ARE IN NATO?

A. WE HAVE A PIANO TUNER, SEVERAL CARPET CLEANERS, INSURANCE AGENTS. THERE'S A

PARAPLEGIC VIET NAM VET IN WASHINGTON, D.C., THAT USES THIS EXCLUSIVELY FOR HIS BUSINESS.

Q. IS THERE ANYBODY IN YOUR TRADE ASSOCIATION WHO IS NOT A SMALL BUSINESS PERSON LIKE YOURSELF?

A. I'M NOT AWARE OF ANY. WELL, MR. KOLKER'S THE MANUFACTURER, BUT I DON'T THINK HE'S ALL THAT BIG EITHER.

Q. BUT IN TERMS OF THE PEOPLE WHO USE THESE MACHINES IN THEIR BUSINESSES, YOU ARE AN ASSOCIATION OF SMALL BUSINESS PEOPLE?

A. THAT IS CORRECT.

MR. HINKLE: I HAVE NOTHING FURTHER, YOUR HONOR.

CROSS-EXAMINATION

BY MR. SUNDBY:

Q. JUST A COUPLE QUESTIONS. SO FAR THIS YEAR, FOR CALENDAR YEAR 1992, WHAT HAS BEEN

THE GROSS INCOME FROM YOUR CHIMNEY SWEEPING BUSINESS?

A. OKAY. I HAVEN'T --

Q. JUST APPROXIMATELY. I DON'T NEED THE DOLLARS AND CENTS.

A. APPROXIMATELY 60,000, I WOULD PRESUME.

Q. AND DO I UNDERSTAND YOUR TESTIMONY CORRECTLY IN THAT 70 PERCENT OF THE GROSS RECEIPTS THAT YOU RECEIVE COME DIRECTLY FROM CONTACTS MADE BY THIS COMPUTER?

A. THAT'S CORRECT.

Q. WHAT HAPPENS WHEN THIS -- SUPPOSING YOU CALL MY HOUSE, I HAVE AN ANSWERING MACHINE. WHAT HAPPENS?

A. MY MACHINE DOES NOT TALK TO ANSWERING MACHINES. IT WILL HANG UP JUST AS SOON AS YOUR MESSAGE STARTS TO GO OUT. IT TALKS LONGER THAN HELLO, YOU KNOW, YOUR

ANSWERING MACHINE. YOU USUALLY ANSWER IT *LIKE, HELLO, YOU'VE* REACHED SO-AND-SO RESIDENCE. MY MACHINE HANGS UP ON YOU.

Q. AFTER HOW MANY SECONDS?

A. WELL, IT TAKES LESS THAN A SECOND TO SAY HELLO, SO I WOULD PRESUME PROBABLY THREE SECONDS MAXIMUM WOULD BE YOUR TIE-UP TIME.

MR. SUNDBY: I HAVE NO FURTHER QUESTIONS, YOUR HONOR.

THE COURT: WHAT IF, SAY, THE MACHINE THAT YOU REACH SAYS HELLO. DOESN'T THE HELLO CHIP THEN --

THE WITNESS: IF IT WOULD SAY HELLO AND LEAVE SOME DEAD TIME, THEN IT -- IT'S POSSIBLE. I PRESUME THAT IT WOULD HAPPEN, BUT SO FAR I HAVE NEVER HEARD IT ON ANY OF MY RESPONSE MESSAGES. BUT I SUPPOSE IT'S POSSIBLE.

THE COURT: IN YOUR FORM OF ADVERTISING FOR YOUR BUSINESS, HAS DIRECT MAIL BEEN USED OR PRICED OUT?

THE WITNESS: WE PRICED OUT DIRECT MAIL, BUT WE -- WE DID FLIERS. WE STARTED OFF WITH 1500 A WEEK. WHEN THE TELECOMPUTER BECAME ILLEGAL IN THE STATE OF OREGON, WE DROPPED THE TELECOMPUTER USAGE AND UPPED OUR FLIER DISTRIBUTION TO 10,000 A MONTH, WHICH IS THE CALLS WE FIGURE WOULD BE GENERATED BY THE TELECOMPUTER, BECAUSE WE DIDN'T HAVE THE MONEY TO DO DIRECT MAIL. SO I HAND DELIVERED DOOR-TO-DOOR 10,000 FLIERS A MONTH AND DELIVERED ONLY TO CHIMNEYS, WHICH DIRECT MAIL YOU WOULDN'T GET TO ONLY CHIMNEYS. AND, FOR ALL OF MY EFFORTS WITH DOOR-TO-DOOR FLIERS, I RECEIVED 36 JOBS.

THE COURT: OKAY. ANYTHING FURTHER?

REDIRECT EXAMINATION

BY MR. HINKLE:

Q. MRS. MOSER, YOU MENTIONED THERE THE ILLEGALITY IN OREGON. ARE YOU REFERRING TO THE OREGON STATUTE?

A: THERE'S ONE IN SALEM.

Q. AND DID YOU CHALLENGE THE OREGON STATUTE?

A. OH, YOU'RE TALKING ON THE TELECOMPUTERS, YES, WE DID.

Q. YES. I'M SORRY.

A. YES, WE CHALLENGED THE LAW IN OREGON.

MR. HINKLE: SINCE YOU MENTIONED THAT, I JUST WANTED TO CITE, FOR THE RECORD, THE OREGON COURT OF APPEALS DECISION IS MOSER AGAINST FROHNMAYER, 112 OR AP 226, WHICH DECLARED THE OREGON STATUTE UNCONSTITUTIONAL UNDER THE STATE CONSTITUTION.

THE COURT: ARE YOU PRESENTLY, THEN, USING YOUR TELECOMPUTER?

THE WITNESS: UNTIL DECEMBER 20TH.

MR. HINKLE: NOTHING FURTHER.

MR. SUNDBY: NOTHING FURTHER.

THE COURT: OKAY. THANK YOU.

MR. HINKLE: NOW, YOUR HONOR, I WOULD LIKE TO ASK MR. KOLKER A FEW QUESTIONS, AND HE'S MY ONLY OTHER WITNESS.

THE COURT: DO YOU HAVE ANY OTHER WITNESSES HERE?

MR. HINKLE: NO.

THE COURT: APPARENTLY, MISS MAGO, WE CAN'T HAVE BOTH OF YOU AND THE WITNESS THEY WISH TO TESTIFY BY PHONE ON THE LINE AT THE SAME TIME. OUR COMPUTERS OBVIOUSLY AREN'T UP TO DATE. IN ANY EVENT, THIS IS MR. KOLKER WHO SUBMITTED AN AFFIDAVIT. AND

I WOULD ASK, BEFORE WE HANG UP ON YOU, TO CALL

-- WE WILL CALL YOU BACK AFTER HIS TESTIMONY.

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Of Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

KATHRYN MOSER and NATIONAL ASSOCIATION OF TELE-COMPUTER OPERATORS,

Plaintiffs,

v.

FEDERAL COMMUNICATIONS COMMISSION, a federal agency, and ALFRED C. SIKES, in his capacity, as Chairman of the Federal Communications Commission,

Defendants.

Civil No. 92-1408-AS

AFFIDAVIT OF CARL R. KOLKER

STATE OF CALIFORNIA)
) ss
COUNTY OF SAN DIEGO)

I, Carl R. Kolker, being first duly sworn, hereby depose and say that:

1. I am President of Kolker Systems, Incorporated, which is a manufacturer of automatic dialing devices such as those regulated by the Telephone Consumer Protection Act of 1991 ("TCPA").

2. One of the problems cited as a reason for legislation was that "automated calls will not disconnect the telephone line for a long time after the called party hangs up the phone, thereby preventing the called party from placing his or her own call." While older technology did tie up the called party's line, present technology avoids that problem. Since August 1987, automatic dialing devices include a mechanism that allows for a disconnect to occur in less than one second after the called party hangs up the telephone. In addition, today's state-of-the-art autodialer products use a solid state digital voice recorder for the outgoing message and, hence, are not susceptible to mechanical

problems of tape wear and breakage that caused line tie-up with older devices. Technology has advanced to the point that the called party is disconnected immediately once they hang up the telephone.

3. Also cited as one of the reasons for enacting the TCPA was that "some automatic dialers will dial numbers in sequence, therefore tying up all the lines of a business and preventing any outgoing calls." Historically, when using a sequential dialing mode of operation, older products could only indiscriminately dial sequentially through an entire exchange, and did not have the ability to delete blocks of numbers not to be dialed, such as those of hospitals, government agencies, and businesses with numerous sequential numbers. However, only a few of these older products are in operation today. Today's autodialer products provide the user with the ability of entering the start and ending number of a block of numbers not to be dialed. Contrary to some claims, a single autodialer cannot tie up more than one line at a time.

4. Also listed as a problem with automated calls necessitating the need for passage of the TCPA was "the automated calls fill the entire tape of an answering machine, preventing other callers from leaving messages." Older autodialer products had no way of detecting an answering machine, and consequently would almost always play out to an answering machine. However, current autodialer product technology provides a means to distinguish the human voice response from an answering machine. Accordingly, using today's technology, the chances of an autodialer message being recorded on an answering machine has been reduced to almost zero.

5. Consumers also complained that autodialers could call the same home several times a day. This could be a problem with older technology systems. However, since August 1987, autodialer systems have been manufactured with a foolproof method of detecting duplicate number entries. Before dialing any number, the system searches its memory to determine whether the number about to be dialed has already been dialed. If the

number has been previously dialed, the number is then logged as a duplicate and does not get redialed.

6. The Senate report also noted that automated calls were being received at all hours of the night and day. The regulations implementing the TCPA limit initiation of telephone solicitations to residences to the hours of 8:00 a.m. to 9:00 p.m. Although originally autodialers did not inhibit initiation of calls between any specified hours, the technology existing today automatically inhibits calling out between the hours of 9:00 a.m. and 9:00 p.m.

7. The major problem with automated calls that contributed to the perceived need for legislation was the indiscriminate use of sequential or random number dialing. The second most recited reason was that the older equipment would not immediately disconnect when the called party hung up. Technology exists today to eliminate these two problems. Regulations could be drafted to require all telemarketers to utilize equipment employing the technology available today, thereby avoiding all the problems cited as requiring legislation. The ban

on prerecorded messages for commercial advertisements does not address these problems.

8. Although the FCC identified a network technology solution in its Report and Order that would not accomplish its stated goals, there is such a technology available. Specifically, consumers of telephone services could subscribe to a program, for a minimum monthly fee, to block incoming telemarketing calls. This method would require all telemarketers to dial a "blocking code" before dialing any number. If the number dialed was a subscriber, the call would not be completed and the telemarketer would be informed via a prerecorded message that the number did not accept such calls. This technology allows individual consumers to choose whether or not to accept telemarketing calls. This is essentially the same methodology now used to block identification of the caller's number on a Caller I.D. display.

Carl R. Kolker

SUBSCRIBED AND SWORN to before me this 7th day of November, 1992.

Louise L. Edwards
Notary Pulic for California
San Diego County
My Commission Expires: 3-24-96

TELEMARKETERS FIGHT BANNING OF AUTODIALERS

By Mary Lu Carnevale
Staff Reporter of THE WALL STREET JOURNAL
January 20, 1993
Pages B1-B2

Kathryn Moser loves a marketing device that makes millions of consumers see red.

Her company in Keizer, Ore., uses a $1,786.50 computer that automatically dials telephone numbers, delivers a recorded sales pitch and lets potential customers leave messages. For many people, such calls are an intrusion. But despite their unpopularity, Mrs. Moser maintains that they are the key to survival for many small businesses--including hers.

Indeed, Mrs. Moser says the telecomputer is the only sales tool that turns up enough leads to keep her family's **A-Aa-1 Lucky Leprechaun Co.** chimney-sweeping business in the black. And she isn't about to let the government outlaw it.

Key Provision

Mrs. Moser and the National Association of Telecomputer Operators, an organization that she founded to fight government restrictions on telecomputers, won a preliminary injunction last month stopping the Federal Communications Commission from enforcing a key provision of the Telephone Consumer Protection Act of 1991. To protect consumers from pesky telemarketing calls, lawmakers barred commercial ventures from using autodialers to deliver prerecorded messages.

In issuing the injunction, Federal District Judge James A. Redden in Portland, Ore., wrote that the law might not make much of a dent in the volume of unsolicited telemarketing calls. But he cited Mrs. Moser's testimony that it could wipe out Lucky Leprechaun.

Federal law does permit pollsters, politicians and nonprofit groups to deliver prerecorded messages, and it allows companies to use devices known as "predictive dialers." These ring many phone numbers simultaneously and instantly transfer answered calls to live operators, who may give a sales pitch or offer to play a recorded message. But, Mrs. Moser argues, "Mom-and-pop businesses can't afford live operators." A Justice Department lawyers says the government could appeal the injunction or proceed with a trial.

This isn't the first time that Mrs. Moser, a peppery 43-year-old, and her husband, Ronald, 47, have taken on the government. An Oregon state appeals court ruled in their favor, declaring that a similar Oregon telemarketing law violated their free-speech rights. That case is now pending in Oregon's Supreme Court.

The Mosers started Lucky Leprechaun in 1986 in Salt Lake City, using $5,000 of the $8,000 Mrs. Moser received in a buyout from her former employer. While her husband cleaned and repaired chimneys, Mrs. Moser trudged door-to-door to hand out fliers. The payoff was paltry.

First Week

Lucky Leprechaun's fortunes turned in September 1988 after Mrs. Moser began using a telecomputer that can dial and deliver messages to about 400 consumers a day. "In the first week, we recovered the full $436.50 monthly rental fee," Mrs. Moser says, adding that Mr. Moser can generally clean as many as six chimneys a day at an average cost of about $50.

The Mosers later decided, for health reasons, to move to a state with milder winters than Utah's. They chose Oregon, and moved there after getting official assurances that Oregon had no restrictions on autodialers. "They said it was OK, but didn't tell us a new law was in the works," recalls Mr. Moser.

It went into effect in October 1989, two months after their move, forcing them to switch off their machine. After weeks of sluggish orders, the Mosers turned to the American Civil Liberties Union, which handled the Oregon case. To finance the federal lawsuit, the Mosers rounded up about 40 small businesses, including **Kolker Systems Inc.**, Carlsbad, Calif., the sole U.S. maker of single-phone-line telecomputers, and formed the National Association of Telecomputer Operators.

Few consumers share the Mosers' First Amendment concerns. Indeed, lawmakers and regulators have been flooded with complaints from people who want to silence computer-generated pitches. "People are terribly annoyed that this new technology is being used to invade their privacy," says Gene Kimmelman, legislative director for the Consumer Federation of America.

Chairman Edward Markey of the House Telecommunications and Finance Subcommittee proposed developing a list of consumers who don't want to get telemarketing calls and barring telemarketers from calling them. But the bill's language was weakened in the legislative process, and the FCC approved a bare minimum of rules to carry out the new law.

Karen Brown, research director for the Center for the Study of Commercialism, a Washington-based group that lobbied for a tough telemarketing law, argues that the new law doesn't go far enough. The group wants the FCC to establish a national database of consumers who don't want to be called by telemarketers. But the FCC rules only call for consumers to ask each telemarketer to remove their names from calling lists; telemarketers must comply or face fines. Ms. Brown urges consumers to keep a "telenuisance list" by their phones and note unwelcome calls.

Without restrictions, Ms. Brown contends, telemarketing will mushroom. "Congress found that 18 million people a day get telemarketing calls," she notes. "Now, telecomputers are becoming so cheap and efficient that the 10,000 out there could multiply to 50,000 in a year if someone doesn't nip it in the bud. All types of telemarketing are annoying."

Mrs. Moser counters that she needs her machine to survive. She insists that she tries to lower the annoyance level by delivering the 15-second Lucky Leprechaun pitch only between 9 a.m. and 8 p.m., and never on Sundays. And telephone exchanges used by hospitals, businesses and government agencies are blocked, as are the numbers of irate consumers.

Charles Hinkle, the Portland lawyer who argued both the state and federal cases, says consumers who dislike unsolicited calls have a simple remedy: "Hang up your phone."

Others don't see it quite that way, though. "Where does all this stop?" asks Kenneth McEldowney, executive director of Consumer Action in San Francisco. "If one small business with a single line can make 150,000 calls a year with this system, what happens if every small business got one?" He also suggests that the FCC needs to establish a national do-not-call list.

Carl R. Kolker, president of Kolker Systems, says lawmakers ignored new technology. Consumers who complained that recorded messages filled their answering machines or prevented them from making emergency calls were victims of older devices that can't be used under the new law, he says. Even such critics as Ms. Brown acknowledge that newer devices and ones that have been upgraded to comply with the new law can drop calls within seconds after the recipient hangs up and let operators delete specific numbers or blocks of numbers from the automatic-dialing sequence.

But Mr. McEldowney maintains that whatever the technological advances, the central problem remains: Consumers' privacy is invaded.

DREAD RINGERS

By: Teresa Riordan
The Washington Post Magazine, February 23, 1992,
FINAL Edition

You're the kind of person who has magneted to your refrigerator a yellowing cartoon of hostile space aliens threatening to "telemarket the Earth." You're the sort who gloats when the evening news features your local congressman crowing about new legislation that further limits intrusive phone calls. You're the type who hates all telemarketers forever and ever because more than once your soothing bubble bath has been rudely interrupted by a caller wanting you to purchase a time-share at the Tundra Lodge in northeastern Manitoba.

Well! The telemarketers of America want you to know they are not disembodied voices projecting from some soulless void. They are flesh and blood, human beings, even, and they have feelings too.

So you want to talk about rude, huh? Honey, you don't know rude until a little old lady politely asks you to hold a moment, only to return with a whistle, which she blows into the receiver with the lung power of an Olympic swimmer.

What about 6-year-olds who officiously screen their parents' calls by saying, "I'm sorry, but Mummy doesn't have time to speak to a telemarketer." Click.

And people who say, "Could you call back in a half hour?" and you do, and the phone rings and rings and rings. Or, "Would you like to speak to Junior or Senior?" and you pick Junior and they say, "He doesn't live here." So you say Senior and they say, "Oh, he's dead."

Then there are the phone machines that start off, "If you're a bill collector, the check is in the mail; if you're a telemarketer, I don't need it . . ."

As long as we're talking about answering machines, let's not forget having to endure dozens of bad impressions of Ronald Reagan, somebody's personal rendition of "I Wanna Sex You Up" and innumerable singing dogs.

Perhaps it's time you changed your attitude toward the telemarketer, who has been dubbed the Fuller Brush man of the Information Age. Why? Because the odds are increasing that the voice on the other end of the line is no longer an irritating abstraction but, instead, your sister, your grandfather, your cousin, your neighbor, your best friend's new boyfriend. Telemarketing, the most maligned profession since used car sales, has burgeoned exponentially since the early 1980s and promises to continue to do so for the coming decade.

Consider some startling statistics. Currently about 3.5 million Americans are employed by the telemarketing industry-85 percent of them the people who handle calls. By the year 2000, according to one estimate, 8 million Americans are expected to be telemarketers.

Telemarketing's image problem is partly a matter of definitions: We tend to think of telemarketers only as those people who harass us at home during the dinner hour, but the telemarketing industry is much broader than that. (Did I hear a collective sigh of relief that not every one of those 8 million Americans will be calling you at home?) It also includes inbound marketing, or 800 numbers, the vast array of pay-per-call 900 numbers and business-to-business phone sales. Most telemarketers will tell you that stockbrokers-many of whom spend their days cold-calling on the phone-are telemarketers who won't admit to being telemarketers.

And no matter how much we hate telemarketers, they must be doing something right, because we are buying from them at astonishing rates. In 1991 the telemarketing industry reaped $435 billion (industry revenues eclipsed direct mail more than a decade ago) and expended only $60 billion, making it an exceedingly lucrative sales venue in a nation suffering the throes of economic decline. IF TELEMARKETERS ARE VILIFIED BY cranky citizens and sound-biting politicians, they often are treated as dispensable lowlifes by their own employers. Take, for example, a 1991 guide for managers called Telemarketing Factomatic by Peggy Fielding and Garry Drummond. The guide advises: "Don't agonize over the hire/don't hire decision of every applicant. Chances are that he or she won't work out anyway. If the applicants speak the language fluently and clearly, if they can write down basic information, and if their grammar isn't too poor, hire them." "High intelligence has been found to be one of the least important traits for a successful telemarketer." Don't hire "applicants who were fired from their last job for employee theft or other illegal behavior" or "applicants who are obviously intoxicated or drugged out during the interview."

The book also informs the manager his staff must be trained not to use "patronizing endearments" such as Sweetmeat, Sugarlump, Stud, Honkie, Gringo or Bub.

Similar to Telemarketing Factomatic is Gary S. Goodman's 1987 tome, humbly titled Gary Goodman's Breakthroughs in Telemarketing, which states that among the best places to recruit telemarketers are bowling alleys, rock concerts, chiropractic colleges and video arcades.

Telemarketing has long been stereotyped as a college-student ghetto. Suzan Revah is a senior at the University of Maryland who began telemarketing for a home improvement company last summer. For about a month Suzan looked for a job waitressing or in retail. Finally, after embellishing her re'sume', she almost landed a job waiting tables at a Greenbelt restaurant. "But during the interview," she says, "the manager got onto the

topic of uniforms. 'Tight skirts,' he said. 'That's what sells.' He was oozing scum."

Suzan wanted to quit after her first night at the home improvement company, but the boss talked her out of it. Then she planned to quit when school began in the fall. She is still there. "It does pay well," she says. "Of course, no one would do it if it didn't."

Like many telemarketers, she is working part time, averaging about $10 an hour and working 20 hours a week. "If it was any longer I'd kill myself," she says. "It's hard work to have somebody reject you every 50 seconds."

Almost worse than the matter-of-fact "no's," she says, are the excuses people make up. "People think they have to tell you stories of death and dying: Their husband is on dialysis; their mother has cancer; their grandfather just passed away."

Given that the average tenure of a telemarketer is six to 12 months (and who can blame them), the most typical telemarketer is a former telemarketer. Jim Bigus, now a U.S. Foreign Service officer, was a telemarketer in Chicago in his salad days. ("You were?" his wife says. "Oh, that's right-I suppressed it.")

Jim was hired, at minimum wage, to sell cemetery plots. His script-all telemarketers work from a script-was a sales pitch in the guise of a survey. The questions were 1) Do you own your own home? 2) Do your kids go to college? and 3) Do you own your own cemetery plot?

He was unable to sell any plots ("'What do you mean?' people would say. 'I'm not even dead yet!'"), so he quit after two weeks when a friend got him a job painting a house.

Suzan's and Jim's experiences notwithstanding, some telemarketers actually enjoy their jobs. Just three hours west of Washington is the Harrisonburg, Va., division of TransAmerica

Marketing, a Washington-based company. Increasingly, telemarketing operations are relocating to rural areas, which offer an inexpensive labor force that has few white-collar job alternatives (payroll is the industry's number one expense).

For six years, Carolyn Swartz has been phoning 200 people nationwide a day, five days a week, 50 weeks a year. She took the TransAmerica job when she found herself divorced at 33, with two young girls to support. Carolyn is an aspiring country songwriter and performer, and when she calls a number in Nashville, "if they got a famous last name, I'll say, 'Well, are you kin to the great singer So-and-So?' " Thus far she has spoken only to a second cousin of Ricky Skaggs, but she remains hopeful. Like her colleagues at TransAmerica, Carolyn is very, very, very sincere and says nice things about almost all the people she calls. As you might expect, most telemarketers detest calling New Yorkers, who are brutally terse, but not Carolyn. "I talk Southern, and I think they like that," she says, though she is not so sanguine about all regions of the country. She's even written a song about her geographic preferences. But we'll come back to that. WHILE TELEMARKETING IS NOT A BIG industry in the Washington area, the nation's capital is a hub of telemarketing decision-making because of the density of politicians and nonprofit organizations-two big categories of telemarketing users.

Other big users are credit card companies, which sell add-on services over the phone, and publishing companies such as Time-Life Books, which has one telemarketing outlet in the D.C. area and employs 700 full-time telemarketers nationwide. General Electric has a monstrous in-house telemarketing system, with 3,000 callers at 50-plus sites. The Washington Post also uses telemarketers to pull in 18 percent of the paper's new subscribers.

Telemarketing experienced its first major growth spurt during the 1970s, in part because the oil crisis made travel so expensive for the average salesman and in part because harried working mothers found it convenient to buy over the phone.

Omaha rapidly became the nation's telemarketing hub after Northwestern Bell lured companies there to take advantage of the huge phone capacity it had built to accommodate a Strategic Air Command base. Nebraska was attractive for other reasons as well. Real estate was cheap. The labor force was inexpensive and had a small-town work ethic and an inoffensive Walter Cronkite accent. And Omaha was centrally located, allowing companies to call both coasts during normal business hours.

During the '80s, the industry grew even more rapidly as the public became comfortable charging merchandise over the phone and as long-distance rates became cheaper while postal rates continued to climb. Dallas and Denver became hubs in their own right, and Midwestern states continued to aggressively recruit telemarketing firms.

One reason telemarketers have a bad rep is that the public imagines them to be dialing from a smoky cinderblock basement illuminated by a single naked bulb and littered with crumpled potato chip bags and cigarette ashes. In fact, many mom-and-pop telemarketing operations do look like this. But the larger operations are quite high-tech affairs.

"Is this going to be a positive article?" asks Elizabeth Griffin, the marketing director of Springfield-based Equitel Corp. Telemarketing companies are, well, touchy about press coverage. Among those who politely refused to be included in this article are Public Interest Communications (a marketer of politically correct causes) and the telemarketing operations of the Republican National Committee, Arena Stage and several aluminum siding companies. Equitel, one of the largest firms in the Washington area, was one of the few to acquiesce.

To find Equitel, you turn onto Industrial Road and, after passing a gravel pit, take a right onto Industrial Drive and another right at the industrial hardware company. Equitel is at the end of Commercial Drive on the back side of the headquarters of the

Virginia Concrete company. You get the idea. Pricey real estate is not a telemarketing priority.

Equitel sees itself as a high-end boutique firm specializing in magazine subscription renewals and add-on services for telephone companies. The firm's management professes to run a "company of the '90s" where employees are not employees but "team players" and clients are referred to as "partners." In other words, no copies of Telemarketing Factomatic in sight.

The company says it does not make cold calls. "If you're calling out of the blue, it's an intrusion," says Richard Freed, who was recently promoted to president at Equitel. "If you're calling on behalf of a company that the consumer already deals with, that's a different story."

Freed, a West Point graduate and Harvard MBA, reflects the growing professionalism of an industry that-let's face it-doesn't even register yet on the respectability meter. What did his parents think when he moved into this line of work three years ago? "Well, frankly," he says, "they had some reservations."

One of Equitel's clients is Car & Driver magazine, which has 1 million subscribers nationwide. Equitel calls the subscriber list perhaps four times a year-not just for renewals but to sell discount mutual funds, travel club benefits, collision insurance. This type of interdisciplinary selling represents the telemarketing of the future, industry executives say. The Car & Driver name gets the telemarketer into the loyal subscriber's figurative door-allowing the caller to give a sales pitch for something that in fact is completely unrelated to the magazine. At the same time, the telemarketing calls help prompt subscribers to send in their checks at renewal time.

Equitel's calling floor in Springfield (the company has another location in Johnson City, Tenn., that accommodates 105 telemarketers) is about 1,500 square feet of muted steel-blue carpet populated by 36 padded carrels, each equipped with a computer

terminal. On a Monday afternoon, several dozen simultaneous sales pitches merge with the piped disco Muzak into a blurry background hum. The first thing you notice about the room is that there are no telephones at all. Instead, each caller speaks to consumers through a thin, curved tube attached to a Walkman-like headset that is, in turn, attached to a computer terminal.

Equitel's telemarketers range from the temporarily unemployed and permanently laid off to those who need a second job to meet the mortgage payment. Among them are a med student, a PhD candidate, an employee of the CIA, an injured ex-roofer and a former real estate agent. All calls are dialed automatically by a computer known in the biz as a "predictive dialer" (not to be confused with the universally reviled autodialing recorded message machines). A given client's list is fed into the computer, whose dialing pace is determined by a programmable algorithm that factors in how many telemarketers are working, how long their script is and what parts of the country should be called at what time of the day.

The computer puts through a call to a telemarketer and flashes the customer's name on a screen only when it has been answered by a human being-or an answering machine it thinks is a human being. Today it is dialing about 7,400 numbers an hour. About 1,800 of those are answered by phone machines; 240 are busy; 1,550 are answered by human beings; and the rest go unanswered after five rings.

"Hello, my name is J. Simon," says a 29-year-old telemarketer, beginning his 150th pitch of the day. It's actually Keith J. Simon, of Temple Hills. Today he is selling the "Answer Call" service for a regional Bell phone company. This is just one of two jobs for Keith, who works about 80 hours a week. In his other job he ferries the elderly, handicapped and mentally ill from destination to destination. Keith, who just bought a condo, says he couldn't afford to live on just his telemarketing salary.

"Can I be honest with you?" Keith says. "When I first meet someone, I don't tell them I'm a telemarketer. I say I'm a sales associate. I know I'm more than just a telemarketer. I'm not just selling. I'm providing customer service, listening to people's complaints."

In his soft voice, Keith riffs on the script-when the person on the other end permits him to get past hello, that is. After each call, Keith presses a specific key that tells the computer the result of the call. There is a Man/Woman of the House Not at Home key, an Answering Machine key, a No key, a Yes key and even a Hostile Call key.

If the recipient of the call is particularly vitriolic, Keith will fill out a form quoting specific phrases from the complainant. These comments are passed on to the client at management's discretion, and frequently the complainant is excised from the company's calling list. The computer also can spit out geo-demographic reports that identify which area codes or Zip codes are responding particularly well or poorly to the product. Keith's calls are monitored periodically by Equitel management and by the client, who can patch into his telemarketing campaign from any point in the country.

Keith is having a tough time this afternoon. The woman seated next to him, June Thomas, leads the phone room with five confirmed sales for the day. June stands while she gives her current pitch. On the previous call, an elderly woman regaled June with a detailed account of the agonies of her recent cataract surgery and then said, of course, that she wasn't interested in buying anything over the phone.

"Hello? Mrs. Evans?" Keith is saying. "Oh-it's Mr. Evans?" Chalk up another no sale.

"I'm not having a great day," says Keith.

A couple of "no's" later he speaks to a Mr. Kaplan. "You better talk to my wife," Mr. Kaplan says. Mrs. Kaplan seizes the phone. "Don't want it," she says. Click.

During the course of an hour, Keith has endured 45 consecutive rejections. "If you can get them to listen in a relatively calm way-that's a pleasant call," he says, but he doesn't seem entirely convinced of this himself.

At 4 p.m. the Equitel day shift punches out. Keith is sticking around for the second shift. Today is the first of what will be two 12-hour days for him at Equitel this week. PERHAPS, FINALLY, YOU'RE BUILDING A little sympathy for the beleaguered telemarketer, but still hate those unbelievably obnoxious recorded telemarketing messages. Like the one from Las Vegas that inundated Washington phone lines last year.

During this call, a canned radio announcer voice informed you that you had won a prize if only you could answer correctly the following question, which went something like this: Who is the hostess of the popular nighttime game show "Wheel of Fortune?" Is it a) Mother Teresa, b) Margaret Thatcher or c) Vanna White? The machine paused for your answer, and whether you gave one or not said something like, "Congratulations, now please call our 900 number to collect your prize," and, sotto voce, "ONLYNINETEEN-NINETYFIVEFORTHEFIRSTMINUTE."

Actually, many telemarketers hate these machines too. In fact, the American Telemarketing Association's official position is that automatic dialers "should not be used in the absence of a live operator or a prior relationship." This is similar to what the new telemarketing law, signed by President Bush in December, mandates (see box, Page 15).

Few companies seem to want to admit these days that they use automated message machines. "They don't like to stick their head out of the foxhole," says Andrew Lipman, an industry lawyer. Virginia Natural Gas and D.C. Natural Gas, like an

increasing number of public utilities, use automated message machines for bill collection (and the new law will not change this).

Phone Base of Vienna is a company that admits to sending out recorded telemarketing messages for its clients. "I'd rather be called by a computer than a person because I can hang up on it immediately," says John Oakes, the CEO of Phone Base. "It's not some college kid trying to make eight bucks an hour who I have to feel sorry for." Oakes says that his operation already meets the major requirements of the new legislation-mainly the prior relationship clause and the stipulation that such calls immediately disconnect should the called party hang up.

"If you look at the millions of outbound calls our company made last year, the complaints have been infinitesimal," Oakes says. He frames the automated message debate as a class issue. "Rich people don't like being called by a computer," he says. "But Joe Six-Pack prefers it."

The Phone Base computer is housed in a 2,000-square-foot, L-shaped ground-floor area kept at 72 degrees and between 34 and 40 percent humidity. The hook of the L is called the Fiber Optics Room. This is where a tangle of AT&T, MCI, C&P, ICC and Sprint cables feed into the building. The yellow cables, each about an eighth of an inch in diameter, represent 5,000 individual phone lines. They then feed into a huge box that changes the cables' current from light impulses into digital electrical impulses.

In the next room-which is monitored through the windows of an adjoining control room-are about two dozen six-foot cabinets, filled with telephone switches made up of yellow and blue circuit boards. These basically answer the phones and are exactly like the switches flown on C-130s to Saudi Arabia during Desert Storm to enable U.S. troops to call home.

Behind the switches are huge components called Voice Response Units, which collectively have about 55 million billion megabytes of storage. These are where the digitalized voices of such waning celebrities as Phyllis Diller and Bruce Jenner reside and speak the same message over and over again thousands of times a day. To the left are several video display terminals with keyboards. Here Phone Base customizes computer programs for each of its clients.

The major share of Phone Base's business is not in outbound automated message telemarketing but in inbound automated message telemarketing, or 800 numbers.

At Phone Base, 800 number calls are first answered by the computer. A digitalized Bruce Jenner, for example, picks up calls about NBC's pay-per-view Olympics cable service, which is advertised in slick prime-time TV ads and in glossy magazines such as Esquire. Eventually the call may be kicked over to a live operator down the hall in a fluorescent-washed beige version of the Equitel phone room.

On a rainy Tuesday morning, the room, which can hold 30 telemarketers, is populated only by three bored-looking young men. The presence of a soiled Redskins deck indicates they have only temporarily abandoned their card game. Nearby on the floor are the remains of a thrice-read newspaper. Not much pay-per-view Olympics demand today, apparently. IN ADDITION TO GENERAL HOSTILITY from the public, telemarketers have two main nemeses. The first is Dear Abby. One tirade from her, boy, and the Federal Communications Commission swims in 1,500 complaint letters. The second is a man from Illinois named Bob Bulmash. You may have read about him in the Wall Street Journal or The Washington Post.

Telephone his organization, Private Citizen, and you usually get the answering machine: "If you're sick and tired of having telemarketer junk callers barging in any time they feel like

it," Bulmash's recorded voice exhorts, ". . . we'll mail you information on how to join us to FIGHT BACK."

Bulmash tells of one investment firm he claims recently harassed him for a period of several weeks, calling him up to five times a day with bogus telemarketing spiels. He flew to New York, showed up on the company's doorstep to complain in person to management. He wrote letters to, among other places, the New York Stock Exchange, the FCC, AT&T and the FBI. They all wrote back to tell him they weren't going to do anything. "Not going to do anything?" Bulmash says. "I've got the evidence! I've got the tapes!" WHAT REALLY GIVES TELEMARKETING a bad name is fraud.

It's true, telephone scammers pick the public's pocket at a healthy pace. They sell fake Salvador Dali prints for $3,000 apiece, all-expenses-paid vacations to Hawaii that somehow get billed to your credit card without your consent and shares in nonexistent oil wells in Oklahoma. It's sort of hard to put a positive spin on the fact that a couple with the improbable names of Teresa and Marc Suckman milked 135 school districts of $2 million for colored pens that were never delivered.

It's not clear, however, that telemarketing has a higher fraud rate than any other industry. Different authorities estimate that annual telemarketing fraud is anywhere from $3 billion to $15 billion. That's a big chunk of hip cash, to be sure. But look at it another way: Even if it is $15 billion, that's still less than 4 percent of gross annual sales. "Telemarketing fraud is more prevalent than in the past, but the telemarketing industry has exploded too," says Charles Owens, chief of the Economic Crimes Unit at the FBI, which keeps no separate statistics on telephone fraud. No agency does, apparently.

Owens and William Esposito, chief of the FBI's White Collar Crimes Section, say that the popular scams of the moment are loan consolidation schemes (doing a brisk business because of the recession) and counterfeit bank drafts (once the rip-off artist

gets you to tell him your account number, he makes a legitimate-looking withdrawal with the aid of an encoding machine probably obtained during a bank liquidation sale).

At any given moment, Esposito estimates, his agency is investigating 500 telephone scams. "We could jump that up tomorrow to a thousand if we had the manpower," he says. "Unfortunately, in the white collar crime division we have to concentrate on other priorities."

Such as? "Well, such as various savings and loans scandals, BCCI, public corruption . . . ," he says. "You get the picture." Savings and loans? BCCI? Suddenly $15 billion seems an awfully puny sum. BUT WAIT. LET'S NOT END THIS MESSAGE on such a negative note. After all, we've been trying to lower your blood pressure by reminding you that telemarketers are human beings. So let's ring up Carolyn Swartz at TransAmerica one more time.

Defying songwriter Steve Goodman's dictum that all great country songs are about prison, pickup trucks, trains, gettin' drunk or mama, Carolyn has written a song about, yes, telemarketing. She sings the lyrics to me with classic country inflection-over the telephone, of course:

My job requires me to call around, all over the U.S.A.

I talk to people on the phone, lots of them each day.

But the Western states, I must say,

I just can't understand.

They're short, abrupt, in a big hurry,

No time for their fellow man.

(Chorus) Southern hospitality, you can't beat it anywhere.

Sometimes when I'm talkin' on the phone,

City dudes just don't care.

They're cold, harsh and so callous

-have no friendly words at all

But that Southern hospitality surely does beat it all.

It doesn't get any more human than that.

Teresa Riordan is a Washington-based freelance writer.

SUPREME COURT, U.S.
FILED
MAR 5 1993
OFFICE OF THE CLERK

No. 92-1333

In The

Supreme Court of the United States

October Term, 1992

LARRY J. HALL, d/b/a
721 ASSOCIATES and d/b/a
ASSOCIATED MARKETING,

Petitioner,

vs.

STATE OF MINNESOTA, by its
Attorney General, HUBERT H. HUMPHREY III,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Minnesota

RESPONDENT'S BRIEF IN OPPOSITION

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21 pp

QUESTION PRESENTED

I. Whether the Minnesota Supreme Court properly determined under *Central Hudson Gas & Electric Corp. v. Public Service Commission* that the Minnesota Automatic Dialing-Announcing Device statute, which protects residential privacy by requiring the listener's consent to play unsolicited recorded telephone messages, is a reasonable restriction on commercial advertising directed to citizens in their homes.

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STATE OF MINNESOTA, by its
Attorney General, HUBERT H. HUMPHREY III,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Minnesota

RESPONDENT'S BRIEF IN OPPOSITION

Respondent State of Minnesota respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the decision of the Minnesota Supreme Court upholding the constitutionality of the Minnesota Automatic Dialing-Announcing Device ("ADAD") statute, Minn. Stat. §§ 325E.26-.31 (1992). *State v. Casino Marketing Group, Inc.*, 491 N.W.2d 882 (Minn. 1992). (Petitioner's Appendix A-1.)

STATEMENT OF THE CASE

In July 1990, the Minnesota Attorney General's Office received a complaint from Abbott Northwestern Hospital in Minneapolis regarding hundreds of recorded telemarketing solicitations delivered to hospital phones. The recorded calls contained promotions for a credit card and a Las Vegas vacation. Hospital officials were powerless to stop the calls since there was no live operator on the line. (Affidavit of John LeBlanc, Respondent's Appendix A-1.)[1]

Upon investigating the source of these calls, the Attorney General's Office discovered that the calls originated from the Petitioner's home in St. Paul. The calls were delivered to phones in the hospital and thousands of Twin Cities homes by automatic dialing-announcing devices ("ADADs") located in Petitioner's home.

Thereafter, Respondent filed suit against Petitioner in Ramsey County District Court for violating the Minnesota Automatic Dialing-Announcing Device statute, Minn. Stat. §§ 325E.26-.31 (1992). This statute, enacted in 1987, restricts the use of automatic dialing-announcing devices for delivering commercial telephone solicitations.

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[1] There is a factual dispute in the record regarding the number of calls placed to hospital phones. Because this case was appealed after entry of a temporary injunction, there have been no factual findings on this issue. The affidavit of the hospital official in this case states that repeated efforts to stop the calls were unsuccessful, and that the calls continued for ten days. (Affidavit of John LeBlanc, Respondent's Appendix A-1.) Petitioner states in his petition and attached affidavit that the calls to the hospital took place on just one day. (Petition for Writ of Certiorari to the Supreme Court of Minnesota (hereinafter "Petition") at 8 n.4.)

Before a recorded solicitation may be played, a live operator must identify the company placing the call, explain the purpose of the call and the type of goods or services the message is promoting, and state that the caller is attempting to make a sale. Minn. Stat. § 325E.29 (1992). The operator must then obtain the caller's consent before playing the recorded message. Minn. Stat. § 325E.27 (1992). These requirements do not apply if the caller and recipient have a prior business relationship. *Id.*

The district court granted Respondent's request for a temporary injunction to prohibit Petitioner from continuing to violate the ADAD statute, and the Minnesota Court of Appeals and Minnesota Supreme Court upheld the injunction. The supreme court held that the ADAD statute is a valid restriction on commercial speech under this Court's test in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

In seeking review by this Court, Petitioner relies on numerous materials in his "Statement of Facts" that are outside the record of this case and not properly before this Court. For example, Petitioner includes in his appendix an affidavit and a portion of a transcript from a proceeding in federal court in Oregon. (Petitioner's Appendix A-83, A-108.) There is no relevance to these materials and no proper basis for citing such materials and including them in Petitioner's appendix. Nor are the newspaper articles cited in Petitioner's brief and attached to Petitioner's appendix part of the factual record in this case. (Petitioner's Appendix A-115, A-120.) Accordingly, Respondent objects, under Supreme Court Rule 15.1, to the inclusion of these materials in the factual record.

REASONS TO DENY THE PETITION

Petitioner's request for review should be denied because he has failed to show that there are "special and important reasons" for this Court to grant discretionary review pursuant to Supreme Court Rule 10. First, the Minnesota Supreme Court properly applied this Court's test for commercial speech and correctly found that the Minnesota ADAD statute imposes reasonable restrictions on the use of ADADs for delivering commercial advertisements into the home.

Second, there is no conflict between the Minnesota Supreme Court's decision and any decision of any federal appellate court or state court of last resort. Indeed, this Court should allow a body of case law to be developed in the federal courts and other state courts regarding the constitutionality of ADAD laws before considering this issue.

I. THE MINNESOTA SUPREME COURT PROPERLY DETERMINED THAT THE MINNESOTA ADAD STATUTE IS A REASONABLE RESTRICTION ON COMMERCIAL SPEECH UNDER THE COURT'S TEST IN *CENTRAL HUDSON GAS & ELECTRIC CORP. V. PUBLIC SERVICE COMMISSION*.

Petitioner's recorded telemarketing solicitations constitute "commercial speech," which is subject to lesser protection than noncommercial speech. In *Board of Trustees v. Fox*, 492 U.S. 469 (1989), this Court explained that " 'commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position

in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.' " 492 U.S. at 477 (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)).

The standard for the regulation of commercial speech was established in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). Applying the *Central Hudson* test, the Minnesota Supreme Court correctly determined that 1) the state's interest in protecting residential privacy is "substantial"; 2) the ADAD statute directly advances the state's interest in protecting residential privacy; and 3) the statute is "not more extensive than necessary" to serve the state's interests. *State v. Casino Marketing Group, Inc.*, 491 N.W.2d 882, 892 (Minn. 1992). (Petitioner's Appendix A-23.)[2]

In recognizing the state's strong interest in protecting residential privacy, the Minnesota Supreme Court properly noted that the home is not a "public forum" and that citizens enjoy a heightened degree of protection within their homes. 491 N.W.2d at 889. (Petitioner's Appendix A-16.) Indeed, this Court, in upholding a ban on residential picketing, emphasized the citizen's right to avoid unwelcome intrusions into the home:

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[2] Respondent alleges in this case that Petitioner's recorded solicitations for the credit cards and Las Vegas vacations were deceptive and misleading. This issue has not yet been litigated in the state courts. Indeed, the Minnesota Supreme Court remanded the case "with the expectation that the finder of fact will determine whether the prerecorded messages in question are accurate and nondeceptive or whether they are false and misleading." 491 N.W.2d at 892. (Petitioner's Appendix A-23.)

> One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear . . . , the home is different. . . . [A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions.

Frisby v. Schultz, 487 U.S. 474, 484-85 (1988) (citations omitted). *See also FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (upholding ban on "offensive" radio broadcasts and noting that the "individual's right to be left alone plainly outweighs the First Amendment rights of an intruder"). In sum, a home is a "nonpublic" forum, and greater restrictions may be placed on access to citizens within their homes than are permissible in a public forum. *See Cornelius v. NAACP Legal Defense Fund and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985).

The Minnesota Legislature, in adopting the ADAD law, took reasonable steps to protect residential privacy from a growing barrage of unsolicited recorded messages for "credit cards," "vacations" and so-called "prizes" and "awards." As the Minnesota Supreme Court observed, ADADs allow telemarketers hawking their products to "reach an astonishing number of households selected at random." 491 N.W.2d at 889. (Petitioner's Appendix A-16.) The court added that "[u]nlike the unsolicited bulk mail advertisement found in the mail collected at the resident's leisure, the ring of the telephone mandates prompt response . . . . " 491 N.W.2d at 888. (Petitioner's Appendix A-15.) And "[u]nlike the radio or the television, . . . the telephone summons the subscriber, depriving him or her of the ability to select the expression to

which he or she will expose herself or himself." 491 N.W.2d at 888-89. (Petitioner's Appendix A-15-16.) For these reasons, the ADAD statute is a reasonable legislative effort to protect the privacy of citizens in their homes by curtailing the flow of recorded telephone solicitations.

In challenging the ADAD statute, Petitioner contends that there is no basis "to conclude that ADAD calls made with pre-recorded messages without a live operator are more intrusive than live operator calls." (Petition at 29.) This argument overlooks the fact that it is impossible for a citizen to register his or her desire not to continue to receive recorded solicitations if there is no live operator on the call. The absence of a live operator, in fact, made it impossible for officials at Abbott Northwestern Hospital to shut off the flow of recorded solicitations to hospital phones. (Affidavit of John LeBlanc, Respondent's Appendix A-1.) Further, it is well within the legislature's discretion to determine that recorded solicitations are inherently more intrusive than live solicitations and therefore to impose reasonable restrictions on the use of ADADs for commercial purposes.

In any event, the fact that the legislature chose to place certain restrictions on recorded solicitations, while continuing to allow live solicitations, provides no constitutional basis for challenging the ADAD statute's restrictions on recorded calls. Indeed, the Minnesota Supreme Court properly disposed of Petitioner's contention, explaining that "[a] regulation of commercial speech does not fail to directly advance the state's substantial interest merely because it does not eradicate all the evils that

offend that interest." 491 N.W.2d at 890 (citing *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510-12 (1981)). (Petitioner's Appendix A-19.)

Finally, the cases on which Petitioner relies are inapplicable because they involved restrictions on fully protected constitutional speech, rather than commercial speech. For example, *Lamont v. Postmaster General*, 381 U.S. 301 (1965), involved a content-based restriction on mailings that contained "communist political propaganda." And *Troyer v. Town of Babylon*, 483 F. Supp. 1135 (E.D.N.Y.), *aff'd*, 628 F.2d 1346 (2d Cir.), *aff'd mem.*, 449 U.S. 988 (1980), involved door-to-door solicitations by members of a religious group.[3] These cases involving fully protected political and religious speech have no relevance to the present case, which involves restrictions on purely commercial advertising messages delivered to citizens in their homes.

II. THERE IS NO CONFLICT BETWEEN THE MINNESOTA SUPREME COURT'S DECISION AND ANY DECISION OF ANY FEDERAL COURT OR STATE COURT OF LAST RESORT.

As Petitioner correctly points out, the United States Congress and the majority of states have passed laws imposing restrictions on the use of ADADs for delivering commercial messages. At this time, however, there is no

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[3] Significantly, in the one door-to-door canvassing case decided by this Court involving *commercial* speech, the Court upheld a conviction under a city ordinance that banned door-to-door solicitations. *Breard v. City of Alexandria*, 341 U.S. 622 (1951).

conflict between the Minnesota Supreme Court and any other state court of last resort or any federal appellate court regarding the constitutionality of ADAD laws under the First Amendment. Sup. Ct. R. 10.1(b).[4]

Indeed, the case pending in federal district court in Oregon concerning the federal ADAD law will provide the first opportunity for a federal court to address similar constitutional issues. *Moser v. FCC*, No. 92-1408-AS,___F. Supp.___, 1992 WL 435842 (D. Or. Dec. 22, 1992) (granting preliminary injunction to enjoin enforcement of the federal ADAD law). That case, however, is still in its preliminary stages. Before ruling on the constitutionality of ADAD laws, this Court should allow the issues in *Moser* and other cases to percolate through the federal court system.

III. PETITIONER'S HARDSHIP CLAIM PROVIDES NO BASIS FOR THIS COURT TO GRANT REVIEW.

In seeking review by this Court, Petitioner contends that the ADAD statute imposes economic hardship by shutting down his telemarketing operation. However, the

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[4] Although the Oregon Supreme Court struck down the Oregon ADAD law on February 19, 1993, its decision was based solely on the Oregon Constitution and did not involve a First Amendment analysis under *Central Hudson*. *Moser v. Frohnmayer*, No. S39367,___P.2d___, 1993 WL 44178 (Or. Feb. 19, 1993). Because that case was decided under Oregon constitutional law, it does not create a conflict with the Minnesota Supreme Court's decision, which was based on federal constitutional law.

ADAD statute does not bar all commercial telemarketing in Minnesota, and leaves open alternative marketing channels for Petitioner to employ. Petitioner, for example, remains free to contact consumers by telephone with a live operator, and then to play recorded messages to consumers who grant their consent. In sum, the ADAD statute, which imposes reasonable time, place and manner restrictions on telephone advertising to consumers in their homes, leaves open alternative telemarketing channels for Petitioner to employ in advertising credit cards, travel promotions and other commercial products.

Further, Petitioner cites no authority for his contention that the alleged hardship he suffers prevents the state from protecting residential privacy by restricting the use of ADADs. Of course, if claims of "hardship" did provide grounds for challenging otherwise valid public protection laws, then any person who chose to engage in an illegal occupation could assert a hardship claim to prevent enforcement of such laws. Moreover, the restriction on ADADs for commercial marketing is akin to the ordinance banning sound trucks that this Court upheld in *Kovacs v. Cooper*, 336 U.S. 77 (1949). If a city can completely ban the use of sound trucks for delivering messages to citizens, then surely the state can place restrictions on the use of ADADs for advertising products to citizens in their homes.

Finally, Petitioner's hardship claim is undermined by the fact that he started his ADAD business in Minnesota *after* the ADAD statute went into effect in 1987. Because Petitioner chose to set up his telemarketing operation in a

state that already restricted the use of ADADs, any hardship Petitioner suffered was self-inflicted.[5]

For all these reasons, Petitioner's hardship claim provides no constitutional basis for this Court to grant Petitioner's request for review.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the petition be denied.

Respectfully submitted,

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[5] Petitioner stated in his brief to the Minnesota Supreme Court that he had been operating ADADs for "two years." (Appellant's Brief at 7.) The ADAD statute, however, went into effect in 1987, before Petitioner commenced his ADAD telemarketing operation in Minnesota.

APPENDIX

STATE OF MINNESOTA

COUNTY OF RAMSEY

State of Minnesota, by its Attorney General, Hubert M. Humphrey, III,

Plaintiff,

vs.

Casino Marketing Group, Inc., and Larry J. Hall a/k/a Bud Hall, d/b/a 721 Associates, and d/b/a Associated Marketing,

Defendants.

DISTRICT COURT

SECOND JUDICIAL DISTRICT

Case Type: _____

Court File No. _____

AFFIDAVIT OF JOHN W. LeBLANC

I, John W. LeBlanc, being fully sworn upon oath, deposes and says:

1. I am one of the Telecommunications Manager for Abbott Northwestern Hospital, Inc., located at 800 East 28th Street, Minneapolis, MN 55407. I have been the Telecommunications Manager for Abbott Northwestern Hospital for approximately one year. As Telecommunications Manager, I am partially responsible for the operation of the telecommunications system at Abbott Northwestern Hospital.

2. Abbott Northwestern Hospital controls the entire 863 prefix in area code 612, and all calls to an 863 telephone number in this area code are received at the hospital.

3. In my capacity as the Telecommunications Manager, I have learned that patients and employees of the

hospital have been receiving prerecorded telephone calls at the hospital through an automatic dialing device operated by Casino Marketing Group, Inc., of Las Vegas, Nevada. These calls are not preceded by a live operator. Recipients of the calls are instructed to contact 1-800-765-3300 to receive a "prize" of a Las Vegas vacation. It is my understanding that these prerecorded messages have been coming into the hospital since approximately July 1, 1990. These calls have disturbed the patients at our hospital and have inconvenienced our employees.

4. On July 9, 1990, I telephoned the toll-free number of 1-800-765-3300. The purpose of my call was to inform the manager that his company's automatic dialing devices were disrupting patients and interfering with hospital business and to request that the calls cease. I asked to speak with the manager. I was told that the manager was unavailable but that my call would be returned. I did not receive a call back from anyone at Casino Marketing Group, Inc.

5. On July 9, 1990, I received a call from Diane Beach, Director of Volunteer Services at Abbott Northwestern Hospital. Ms. Beach contacted me to complain about a call she received, at a hospital telephone, from Casino Marketing Group, Inc. Ms. Beach stated that she telephoned the toll-free number of 1-800-765-3300 during the week of July 1. During this call, she informed the Casino Marketing Group, Inc., employee they were telephoning a hospital and that the calls were disrupting hospital patients and interfering with hospital business. Ms. Beach asked that the calls be stopped.

6. In my capacity as Telecommunications Manager, I learned from Mary Small, the hospital's Director of Communications/Public Relations, that on or about July 9th, she too had attempted to halt calls into Abbott Northwestern Hospital from Casino Marketing Group, Inc. Ms. Small had telephoned the company at (702) 253-3300, the directory listing for Casino Marketing Group, Inc. Ms. Small informed an employee of Casino Marketing Group, Inc., that calls to Abbott Northwestern Hospital were in violation of Minnesota law and asked that the calls cease. She informed the Casino Marketing Group that approximately 800 patient phones have been disturbed by their employees. The employee thanked her for her information. Apparently no action to halt the calls was taken.

7. Despite these efforts to halt the calls, calls have continued to come into the Abbott Northwestern telephone system from Casino Marketing Group, Inc. Calls have been received every day through July 10, 1990.

8. I am also aware that several individuals at the hospital received a similar prerecorded message offering a "gold card" credit card. Interested recipients were instructed to telephone a local telephone number for more details. This number is answered by an answering machine, asking for the caller's name and phone number. My message on this answering machine requesting that these calls stop was never returned.

9. I am quite concerned about this practice because it is disruptive to patients. Calls have been made by Casino Marketing Group, Inc., to patients in the Intensive Care Unit and coronary care units. These patients are

gravely ill, and disruptive, offensive or annoying calls could endanger their well-being.

Dated: September 24, 1990.

/s/ John LeBlanc
JOHN LeBLANC

Subscribed and sworn to
before me this 24th day
of September, 1990.

/s/ Roberta L. Dalos
NOTARY PUBLIC

[SEAL] ROBERTA L. DALOS
NOTARY PUBLIC - MINNESOTA
ANOKA COUNTY
My Commission Expires Sept. 3, 1991